NO. 83 - 1760

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In the
Supreme Court of the United States

OCTOBER TERM, 1983

St. Paul Fire & Marine Insurance Company, Charles D. Slater d/b/a Slater Boat Company, Euro-Pirates International, Inc., and Steamship Mutual Underwriting Association, Ltd.

Petitioners

v.

Ruth Culver, et al

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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96 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion in *Culver II* is contrary to this Court's decision in *James & Laughlin Steel Corp. v. Pfeifer*, __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). In order to account for the impact of inflation, the Fifth Circuit Court of Appeals has mandated as a matter of law in all civil and maritime cases that the "below market discount rate" method is the sole method to compute loss of future earnings and the sole method for adjusting the award to present value.

2. Whether the opinion in *Culver II* conflicts with holdings of this Court that in civil cases the plantiff has the burden of proving his damages by a preponderance of the evidence by its creation of an irrebuttable presumption that every plaintiff will obtain uninterrupted annual wage increases identical to the rate of inflation through the end of his work-life expectancy regardless of his personal earnings history and by its preventing any contrary evidence to be presented by defendants that may likely decrease or demonstrate fluctuation in future earnings.

3. Whether the opinion in *Culver II* conflicts with the Seventh Amendment preserving the right to trial by jury of fact issues in the district courts, except civil cases in admiralty and maritime jurisdiction, since it implicitly mandates that every plaintiff will be awarded a constant, annual earnings increase for inflation through the end of work-life expectancy, regardless of any contradictory facts reasonably adduced from the plaintiff's earnings and employment history.

STATEMENT OF THE PARTIES

Pursuant to Rule 21.1(b) and Rule 28.1, counsel for petitioners certifies that the following named persons are parties to this proceeding:

(1) Mrs. Ruth Culver, individually and as administratrix of the estate of Curtis Culver and as natural parent of/and Benny Culver, Tonia Culver, Rodney Wayne Culver, and Bridgette Ann Culver;

(2) Charles D. Slater d/b/a Slater Boat Company;

(3) Euro-Pirates International, Inc.;

(4) Ocean Drilling & Exploration Company;

(5) ODECO, Inc.;

(6) Gulf Overseas Marine Corporation;

(7) Gulf Overseas Service Corporation;

(8) Steamship Mutual Underwriting Association, Ltd.; and

(9) St. Paul Fire & Marine Insurance Company.

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IN THE
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, St. Paul Fire & Marine Insurance Company, Charles D. Slater d/b/a Slater Boat Company, Euro-Pirates International, Inc., and Steamship Mutual Underwriting Association, Ltd., pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the *en banc* decision of the United States Court of Appeals for the Fifth Circuit rendered in *Ruth Culver, et al v. Slater Boat Co., et al,* No. 79-3985, reported at 722 F.2d 114 (5th Cir. 1983), petition for rehearing denied February 24, 1984.

The original panel opinion, *Culver v. Slater Boat Co.,* is reported at 644 F.2d 460 (5th Cir. 1981), affirming the district court. A petition for rehearing *en banc* was granted. An *en banc* opinion was rendered, *Culver v. Slater Boat Company (Culver I),* which is reported at 688 F.2d 280 (5th Cir. 1982), reversing and remanding the case to the district court on the issue of damages but otherwise adopting the panel opinion. A petition for rehearing of the *en banc* opinion was granted. *Culver v. Slater Boat Company,* No. 79-3985 was consolidated with *Byrd v. Reederei,* No. 78-3064. The *en banc* opinion in the consolidated cases was rendered on December 22, 1983, *Culver v. Slater Boat Company (Culver II),* 722 F.2d 114 (5th Cir. 1983), from which petitioners seek review by this Court.

The decisions are set forth in the Appendices.[1]

GROUNDS FOR JURISDICTION

The second opinion of the Fifth Circuit Court of

[1] In the *Culver II* opinion, the court reaffirmed parts I-IV of the prior *en banc* decision, 688 F.2d 280, 283-295. It withdrew Parts VII-XII of the decision in *Culver I,* 688 F.2d 295-311. In view of the length and complexity of the footnotes in the withdrawn pages and the cost attendant their being typeset, after consultation with the Clerk of Court, we have omitted such withdrawn portions and the concurring and dissenting opinions from the appendix, 688 F.2d 295-324. However, ten complete photocopies have been lodged with the Clerk of Court for this Court's convenience, if desired for review.

Appeals on rehearing *en banc*, *Culver II*, was rendered on December 22, 1983. A timely petition for rehearing of the *en banc* opinion was filed and the petition for rehearing was denied on February 24, 1984.

This petition for a writ of certiorari was filed within ninety days of the date said rehearing was denied.

Jurisdiction of this Court is predicated upon Title 28 USC §1254 (1).

STATUTORY PROVISIONS

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States.

United States Constitution, Seventh Amendment, states:

> In suits at common law, where the value in controversy shall exceed $20, the right to trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the Rules of the Common Law.

Rule 38 (a), F.R.C.P., states:

> Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Rule 39(a), F.R.C.P., states:

> By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

Decedent, Mr. Culver, was a seaman employed as the foreman of an anchor handling crew, and he was killed while working on a vessel at sea during said employment.

Mrs. Culver filed suit individually and in behalf of her children in the United States District Court for the Eastern District of Louisiana under the Jones Act and the general maritime law against the defendants, Slater, Euro-Pirates, Gulf Overseas, ODECO, and certain insurers. Damages alleged included loss of financial support. The civil action was tired to a jury.

During trial, Mr. Culver's federal income tax returns for five years preceding his death were placed in evidence: 1970-$12,861.56; 1971-$14,031.90; 1972-$16,393.65; 1973-$11,428.95; and 1974-$14,156.61 (R. Vol. 6, pp. 388-89). No evidence was introduced of hourly wage increases from 1970 to 1974. Mr. Culver was not a member of a union and there was no employment contract or agreement covering his earnings. Mr. Culver was thirty-one years of age, and he had a worklife expectancy of thirty-one years.

The district court did not allow testimony, charges or interrogatories to be submitted on the effects of inflation on the damage award. No offer of proof was made by plaintiffs as to the excluded evidence. The plaintiffs chose not to present evidence of a discount rate, nor was the economist listed in the pre-trial order called by plaintiffs. Defendants called an expert witness in the field of bond investments, who testified that an investor in U.S. government bonds, the safest marketplace, could earn nine and one-eighth percent in denominations of $1,000 with a maturity date of 2009 (Mr. Culver's worklike expectancy).

A jury verdict was returned against the defendants. The verdict included specific interrogatories on the elements of damages, including the amount of loss of support sustained by Mrs. Culver and her children. The jury held that loss of support was $13,363.20 per year over his worklife expectancy of thirty-one years. The discount rate applied by the court to reduce future amounts to present value was nine and one-eighth percent.

An appeal was taken by the plaintiffs of the loss of support award with respect to the exclusion of alleged evidence of the impact of inflation upon decedent's wages. The panel of the Fifth Circuit Court of Appeals affirmed the district court on two bases. *Culver v. Slater Boat Co.*, 644 F.2d 460, 463 (5th Cir. 1981). First, the panel held that the *en banc* decision in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), *cert. denied*, 423 U.S. 839 (1975), was dispositive of the inflationary evidence issue—"the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination". Second, the panel opinion noted that no evidence was introduced to warrant argument of proposed earnings increases since the tax returns showed his earnings were level

over five years, not increasing, and Mr. Culver had reached the top of his line of employment. The panel found no error in the treatment of earnings increases, considering the absence of any evidentiary support.

Plaintiffs obtained an *en banc* rehearing to reconsider *Johnson v. Penrod Drilling Co.*. In its opinion, *Culver I,* 688 F.2d 280 (5th Cir. 1982), the Fifth Circuit overruled *Johnson v. Penrod Drilling Co.* After a complex, economic analysis, the Court declined to select one approach to the evidentiary problems attendant introduction of economic testimony relative to the impact of inflation. It held that appropriate economic evidence could be presented by either party to ascertain damages for loss of future wages on a case by case basis. However, in its summary and conclusions, 688 F.2d at 308-10, in the opinion of defendants and this Court,[2] it made serious error in its approved approach.

A petition for rehearing of the *en banc* opinion was filed by defendants. While under consideration, on June 15, 1983, this Court decided *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 76 L.Ed. 768 (1983). On December 23, 1983, the Fifth Circuit *en banc* withdrew portions of its opinion in *Culver I* and rendered a new opinion, *Culver II,* 722 F.2d 114 (5th Cir. 1983). With nine judges dissenting, a majority of the Court (thirteen judges) held that the sole method to adjust damage awards to account for inflation is a "below market discount rate method." Their application of this method is that in all cases the

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[2] In *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541 (1983), at 2554, Note 27, this Court noted that the Fifth Circuit recommended replacing the estimated stream of actual installments (yearly earnings) with an "average annual income." This Court concluded that this approach increases the size of the award providing plaintiffs with an unjustified windfall.

only evidence to be received to calculate future earnings is (1) wage increases, if any, the plaintiff would have received each year as a result of all factors other than inflation and (2) an estimate of the below market discount rate, defined as the estimated market interest rate, adjusted for the effect of any income tax and then offset by the estimated rate of general future price inflation. *Id.* at 122.

Circuit Judges John R. Brown, Fay, Politz, R. Lanier Anderson, III, Randall, Tate, Sam D. Johnson and Jerre S. Williams dissented on the basis that this Court had expressly disapproved of mandating one single method for all cases. Circuit Judge Tjoflat, in dissent, adhered to his opinion in *Culver I* that plaintiffs were not entitled to a new trial. The dissenters noted: (1) the opinion in *Culver II* is in direct conflict with the decision of this Court in *Pfeifer*; (2) in *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 76 L.Ed. 768 (1983), the Supreme Court "chose to allow to the trial judge on remand discretion to apply in a deliberate choice any one or more of the 'legally acceptable' methods the Court discussed"; (3) the High Court chose not to pick one of several methods; and (4) the Fifth Circuit "takes from the district court—and puts squarely in the hands of the Court of Appeals—the responsibility of choosing, from among competing economic theories, the methodology or methodologies which could be used to most equitably and adequately determine future lost earnings under the circumstances of that case". *Id.* at 123-125.

The defendants petitioned for a rehearing of *Culver II* on the following bases: (1) The *Culver II* opinion is contrary to the Supreme Court's decision in *Jones & Laughlin Steel Corp. v. Pfeifer;* (2) The *Culver II* opinion is in error as it mandates that all plaintiffs will receive annual income increases at the identical rate that inflation is found to be

a component in the full market discount rate. It eliminates the plaintiffs' burden of proof. The opinion is insidious in that it is not apparent that it is being mandated in the calculations that annual income will be increased in a straight uninterrupted line at the rate of inflation when the below market discount rate method, as enunciated, is utilized; and (3) The opinion should be modified. The sentence on page 16123 of the opinion reads as follows: "Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors continue, of course, to be admissible." This language should be changed in order to do justice to the parties to allow the trier of fact to consider all relevant evidence unrelated to inflation that is likely to change or influence future earnings.

The rehearing was denied.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit Court of Appeals is contrary to the holding of this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 76 L.Ed. 768 (1983). Loss of earnings can arise in many different contexts and this Court emphasized that no one method should be selected as the exclusive method in all federal courts, *Id.* at 2543-44, unless the legislative branch of the government wishes to evaluate and fashion the proper rule *Id.* at 2557. In *Pfeifer,* this Court reversed the federal district court's selection of a total offset method which held "as a matter of law that future inflation shall be presumed equal to future interest rates" *Id.* at 2543.

The *Culver II* opinion conflicts with the tenet of this Court that in civil cases plaintiffs have the burden to prove

their damages by a preponderance of the evidence. In *Culver II,* the Fifth Circuit Court of Appeals presumes and mandates that every plaintiff will receive in each and every year annual earnings increases at least equal to the rate of inflation. This is implicit as otherwise there is no justification to subtract inflation from the market discount rate, which market rate is certain and is automatically available to the plaintiffs. *Culver II* eliminates plaintiff's burden of proof.

The methodology mandated in *Culver II* deprives defendants of a right to trial by jury of fact issues. If a plaintiff cannot prove the likelihood of his earnings increasing reasonably parallel to inflation rates, the judge or jury should have the right to so find. If a defendant can prove the likelihood that earnings may decrease or periodically fluctuate, the judge or jury should have the right and duty to consider all such influences upon earnings. Variability in each workers earnings should be allowed in evidence. *Pfeifer,* at 2548-50.

ARGUMENT

1. THE OPINION IN *CULVER II* IS IN CONFLICT WITH THIS COURT'S DECISION IN *JONES & LAUGHLIN STEEL CORP. V. PFEIFER,* __ U.S. __, 103 S.Ct. 2541, 76 L.ED.2D 768 (1983).

The issue before the Fifth Circuit Court of Appeals in *Culver v. Slater Boat Company* was the same issue upon which this Court deliberated in *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983): the calculation of an appropriate award for lost earnings, including calculation of the impact of inflation. While in *Pfeifer* this Court restricted its opinion to

negligent actions under §5(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905(b), *Id.* at 2555, the cause of action under §905(b) is a maritime tort and damages are founded in the general maritime law. Since the *Culver* case involved a suit under the Jones Act, 46 U.S.C. §688 and the general maritime law, the *Pfeifer* decision is applicable.

In *Pfeifer,* this Court reviewed possible approaches to calculate loss of earnings. The magnitude of inflation and its predictability with reference to an individual is in large measure unpredictable. *Id.* at 2555. Specific forecasts of future inflation are too unreliable for use in many cases. *Id.* at 2544. This Court recognized that loss of earnings can arise in many different contexts and in some sectors of the economy it is far easier to assemble evidence of an individual's most likely career path. *Id.* at 2555. This Court emphasized the right and duty of the district judge or jury to estimate the shape of the plaintiff's future income stream. *Id.* at 2551. This Court expressly chose not to pick one of several methods reviewed for calculating lost future wages in all civil cases. It held that such an approach is not warranted, noting that the legislative branch of the federal government is far better equipped to fashion the proper general rule, if any. *Id.* at 2555. This Court was not prepared to impose on unwilling litigants one specific method making assumptions as to the impact of national patterns of wage growth on an individual or an industry. *Id.* at 2557.

The entire method to calculate future loss of earnings established in *Culver II* is succinctly stated:

> We hold that factfinders in this Circuit must adjust damage awards to account for inflation

> according to the below-market discount rate method. The parties may, if they wish, stipulate the below-market discount rate, as they may stipulate any other disputed issue. If they are unable to do so, they may intorduce expert opinion concerning the appropriate rate. Other evidence about the effect of price inflation is inadmissible. Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors, continue, of course, to be admissible. 722 F.2d at 122.

The opinion in *Culver II* conflicts with all of the aforesaid holdings of this Court. It expressly adopts one single method of calculating future lost earnings in all cases. 722 F.2d at 122. It is inflexible. It eliminates any possibility of a deliberate choice by a judge or jury of a reasoned approach to calculate an individual's future earnings stream consistent with the facts in the case. It holds as a matter of law that in all cases every plaintiff's annual wages will grow as fast as the inflation rate whatever evidence might have been submitted to the contrary. It mandates and insures an inflation proof future for all plaintiffs and in every case where a plaintiff's wages would heretofore have been held not to have kept up with inflation, it will cause overcompensation.

This inflexible standard directly conflicts with this Court's decision in *Pfeifer*. It is economically unsound in many instances, as illustrated by the earnings history of Mr. Culver.

2. THE OPINION IN *CULVER II* CONFLICTS WITH THE HOLDINGS OF THIS COURT THAT IN CIVIL CASES THE PLAINTIFF HAS THE BURDEN OF PROVING HIS DAMAGES BY A PREPONDERANCE OF THE EVIDENCE BECAUSE IT CREATES AN IRREBUTTABLE PRESUMPTION THAT EVERY PLAINTIFF WILL BE AWARDED ANNUAL WAGE INCREASES AT THE IDENTICAL RATE THAT INFLATION IS REMOVED FROM THE FULL MARKET INTEREST RATE TO OBTAIN THE BELOW MARKET RATE, REGARDLESS OF HIS EARNINGS HISTORY.

There is uniform authority that a plaintiff has the burden of proving his damages by a preponderance of the evidence. A plaintiff must prove the likely amount of his lost future earnings. The opinion in *Culver II* conflicts with this established principle of this Court. By ordering use of the single method described as the "below market discount method", the Fifth Circuit Court of Appeals removes entirely the plaintiff's burden of proving that his future earnings stream would annually increase at the rate of price inflation.

For example, if a plaintiff's earnings as a matter of factual findings were never increasing or were variable, even though inflation existed, the plaintiff may not prove it is likely that his earnings would increase consistent with inflation. On the other hand, there is no doubt that when the money received is invested in the market place, he will receive an inflation premium on his investment. Therefore, if plaintiff's earnings, as a matter of fact, are not likely to increase parallel with the rate of inflation, the below-market interest rate cannot properly be used. This was correctly recognized by the Fifth Circuit Court of Appeals in

its opinion in *Culver I,* 688 F.2d at 296-298. It can lead to enormous overcompensation in precisely a case like *Culver.*

The opinion mandates that the effects of inflation are uniform on all individuals and that incomes rise at the rate of inflation. Under the law of this Court, the effect of inflation on an individual's wages must be proven by a preponderance of the evidence. Mr. Culver must meet that burden of proof based on competent evidence. A legal presumption should not be allowed to replace this fundamental principle of this Court.

3. THE DECISION OF THE FIFTH CIRCUIT IN *CULVER II* VIOLATES THE RIGHT TO TRIAL BY JURY OF FACTUAL ISSUES GUARANTEED IN THE UNITED STATES CONSTITUTION.

The Seventh Amendment to the United States Constitution states that the right of trial by jury shall be preserved and no fact trial by jury shall be otherwise reexamined in any Court of the United States. Rule 38(a) of the Federal Rules of Civil Procedure states that the right of trial by jury is declared by the Seventh Amendment to the Constitution or as given by a Statute of the United States shall be preserved to the parties inviolate. Rule 39(a) guarantees trial of all issues of fact to the jury.

In the *Culver* proceedings, plaintiffs filed a civil action under the Jones Act and the general maritime law and received a jury trial. If the decision in *Culver II* is upheld, each plaintiff will be irrebuttably presumed to have increased his annual income at the inflation rate for his entire worklife expectancy regardless of whether there is any proof that his past annual earnings increased at all consistently with past rates of inflation or that his future earnings are

likely to do so, and regardless of the characteristics of the individual and the industry in which he is employed. It is unclear in *Culver II* how the plaintiff's historical earnings records can be submitted to the district judge or jury for its deliberation or how the jury can consider the likelihood of future changes (up or down) in an individual's earnings based on the facts peculiar to the individual and the case at bar. Issues of fact necessary for the jury to evaluate the particular individual's likely future earnings are foreclosed by *Culver II.*

The court in *Culver II* abrogates the constitutionally protected right in a civil trial for damages to have a jury determine as a fact issue the likely impact of inflation upon a plaintiff's future earnings.

CONCLUSION

In *Culver II,* the Fifth Circuit holds that the impact of inflation on an individual's future earnings is certain and invariable by mandating its below market discount rate method. The decision is contrary to the dictates of this Court in *Pfeifer.* It conflicts with the burden of proof established by this Court in civil actions and is contrary to the right of trial by jury of fact issues.

Petitioners pray that a *writ of certiorari* be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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By: _____
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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been sent to each opposing counsel of record, by depositing same in U.S. Mail, postage prepaid, this 28TH day of April, 1984.

I further certify that all parties required to be served have been served.

MAT M. GRAY, III

APPENDIX "A"

Ruth CULVER, et al.,

Plaintiffs-Appellants Cross-Appellees,

v.

SLATER BOAT CO., et al.,

Defendants-Appellees Cross-Appellants,

EUROPIRATES INTERNATIONAL, INC., et al.,

Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, et al.,

Defendants-Appellees Cross-Appellants.

Willie Mae BYRD, As Administratrix of the Estate of Lawrence Byrd, deceased,

Plaintiff-Appellant Cross-Appellee,

v.

Henrich Schmidt REEDEREI,

Defendant-Appellee Cross-Appellant.

Nos. 79-3985, 78-3064.

United States Court of Appeals,
Fifth Circuit.*

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452 October 14, 1980.

Dec. 22, 1983.

Wife and children of foreman of anchor-pulling crew brought maritime personal injury case arising out of death. The Court of Appeals affirmed a judgment of the United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., as modified, 644 F.2d 460, but, on rehearing en banc, the Court of Appeals reversed and remanded, 688 F.2d 280. Appeals from judgment of the United States District Court for the Middle District of Florida, Wm. Terrell Hodges, Chief Judge, were consolidated. On petition for rehearing, the Court of Appeals Alvin B. Rubin and Frank M. Johnson, Jr., Circuit Judges, held that: (1) the case-by-case method is no longer to be used to adjust damage awards for inflation, and (2) fact finders must adjust damage awards to account for inflation according to below-market discount rate method.

Judgments reversed and cases remanded.

Brown, Circuit Judge, dissented and filed opinion in which Fay, Politz, R. Lanier Anderson, III, Randall, Tate, Sam D. Johnson and Jerre S. Williams, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, dissented and filed opinion.

Tjoflat, Circuit Judge, dissented and filed opinion.

Appeals from the United States District Court for the Eastern District of Louisiana.

Appeals from the United States District Court for

the Middle District of Florida.

ON PETITIONS FOR REHEARING

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.**

ALVIN B. RUBIN and FRANK M. JOHNSON, Jr., Circuit Judges:

In *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975), this court held that juries "should not be instructed to take into account future inflationary or deflationary trends in computing lost earnings..." *Id.* at 241. Reviewing that decision in our first *en banc* consideration of these two cases, we overruled *Penrod* and held admissible evidence of inflation's probable effect on damage awards. *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir.1982) (en banc) (Culver I). Concluding that the jury should resolve the issue on a case-by-case basis, we disclaimed any intention to establish a "single method"

** Judge Garza participated in the first en banc hearing but took senior status on July 7, 1982. He, therefore, did not participate in the first en banc decision. Subsequently, he became qualified to sit by virtue of the 1982 amendment to 28 U.S.C. § 46(a). He has, however, elected not to participate.

Judges Garwood, Jolly, Higginbotham, and Davis joined the Court after submission and oral argument and elect not to participate.

for considering future economic conditions. *Id.* at 299 n. 23. Instead, we discussed several permissible methods the district courts and parties could use. *Id.* at 305-06.

While we were considering an application for rehearing in *Culver I,* the Supreme Court decided *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). The Court's opinion in *Pfeifer* cites *Culver I* and confirms our holding that the fact-finder should consider inflation in determining an appropriate damage award. The Court's opinion also emphasizes, however, a fundamental point that we do not fully consider in *Culver I:* that courts must not allow the adjustment for inflation to convert "[t]he average accident trial...into a graduate seminar on economic forecasting.' "[1]

Reconsideration of *Culver I* in light of *Pfeifer* has convinced us that our failure to identify a single method as the one trial courts should use in adjusting damage awards for inflation, particularly in jury trials, would extend an invitation to litigants to engage in just such a seminar. We, therefore, withdraw the opinion in *Culver I* insofar as it goes beyond overruling *Johnson,* and hold that, in the absence of a stipulation by the parties concerning the method to be used, fact-finders shall determine and apply an appropriate below-market discount rate as the sole method to adjust loss-of-future-earnings awards to present value to account for the effect of inflation. While expert testimony and jury instructions must be based on this method, juries may be instructed either to return a general verdict or to answer special interrogatories concerning the computation of damages.

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[1] *Jones & Laughlin Steel Corp. v. Pfeifer,* __ U.S. __, 103 S.Ct. 2541, 2556, 76 L.Ed.2d 768 (1983) (quoting *Doca v. Marina Mercante Nicaraguense, S.A.,* 634 F.2d 30, 39 (2d Cir. 1980)).

I.

The calculation of damages suffered either by a person whose personal injuries will result in extended future disability or by the representatives of a deceased person involves four steps: estimating the loss of work life resulting from the injury or death, calculating the lost income stream, computing the total damage, and discounting that amount to its present value.

In *Pfeifer* the Court recognized, as we did in *Culver I*, that calculation of the lost income stream begins with the gross earnings of the injured party at the time of injury.[2] To this amount other income incidental to work, such as fringe benefits, should be added. From it, the fact-finder should subtract amounts the wage earner would have been required to pay, such as income tax and work expenses.[3]

Even in a non-inflationary economy, earnings of a worker "tend to inflate" from the operation of a number of factors, "some linked to the specific individual and some linked to broader societal forces."[4] The operation of both kinds of influences should be considered to reach the first

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[2] The same principles apply if the suit, like these two, involves a loss of earnings by a decedent. For simplicity we embrace in the term "loss of earnings by the plaintiff" the losses suffered by the next-of-kin or others entitled to recover in a wrongful death proceeding. In such cases, of course, the objective is to determine the loss of benefits the survivor would have suffered. Therefore, computation of the earnings lost by the deceased provides only a starting point for determining the loss of benefits suffered by the survivors.

[3] When the suit is for wrongful death, the maximum loss of benefits to the survivors cannot be determined without also subtracting the living expenses that the worker would have incurred had he continued to live and work.

[4] *Pfeifer*, __ U.S. __, 103 S.Ct. at 2549, 76 L.Ed.2d at 782.

stage in calculating an appropriate award, an estimate of what the lost stream of income would have been "as a series of after-tax payments, *one in each year of the worker's expected remaining career.*"[5]

A lump-sum award may be invested in a wide variety of securities, yielding varying rates dependent in part on their relative safety. Both *Pfeifer* and *Culver I* require that rate to be based on the return available from "the best and safest investments,"[6] and to be computed after considering the effect of income tax on the interest received.[7]

The rate of interest available even on the safest investments varies depending on time at which the investment matures. Therefore, in computing the rate to be used, it is essential to determine how the award will be invested. In *Pfeifer,* the Court recognized that the plaintiff might invest the award "exclusively in safe short-term notes, reinvesting them at the new market rate whenever they mature," or in "a mixture of safe short-term, medium-term, and long-term bonds, with one scheduled to mature each year of his expected worklife." It then stated, "We perceive no intrinsic reason to prefer one assumption over the other."[8]

Inflation, which has been a permanent fixture in our

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[5] *Id.* at __, 103 S.Ct. at 2550, 76 L.Ed.2d at 782 (emphasis added).

[6] *Pfeifer,* __ U.S. at __, 103 S.Ct. at 2550, 76 L.Ed.2d at 783 (quoting *Chesapeake & Ohio R. Co. v. Kelly,* 241 U.S. 485, 491, 36 S.Ct. 630, 632, 60 L.Ed. 1117, 1123 (1916)); *Culver I,* 688 F.2d at 302.

[7] *Pfeifer,* __ U.S. at __, 103 U.S. at 2550, 76 L.Ed.2d at 783; *Culver I,* 688 F.2d 302 n. 32.

[8] *Pfeifer,* __ U.S. at __ n. 23, 103 S.Ct. at 2551-52 n. 23, 76 L.Ed.2d at 785 n. 23.

economy for many decades, affects both the income stream and the market interest rate. In this opinion, we consider only the method of taking general economic inflation into account. In accomplishing this, as we said in *Culver I,* "[t]he goal is not...to *protect* the lump-sum award from the effect of inflation." It is, instead, "to assure the plaintiff the equivalent of the total of all of his future wages," including those earnings likely to be affected by inflation.[9]

As the Court noted in *Pfeifer,* three methods are available for adjusting damage awards to account for the effect of inflation. In the case-by-case method, the fact-finder is asked to predict all of the wage increases a plaintiff would have received during each year that he could have been expected to work, but for his injury, including those attributable to price inflation. This prediction allows the fact-finder to compute the income stream the plaintiff has lost because of his disability. The fact-finder then discounts that income stream to present value, using the estimated after-tax market interest rate, and the resulting figure is awarded to the plaintiff.[10]

In the below-market-discount method, the fact-finder does not attempt to predict the wage increases the particular plaintiff would have received as a result of price inflation. Instead, the trier of fact estimates the wage increases the plaintiff would have received each year as a result of all factors other than inflation. The resulting income stream is discounted by a below-market discount rate. This discount rate represents the estimated market interest rate, adjusted for the effect of any income tax,

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[9] *Culver I,* 688 F.2d at 287.

[10] *See Pfeifer,* __ U.S. at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790; *Culver I,* 688 F.2d at 298.

and then offset by the estimated rate of general future price inflation.[11]

The third method is the "total-offset" method. In this calculation, future wage increases, including the effects of future price inflation, are legally presumed to offset exactly the interest a plaintiff would earn by investing the lump-sum damage award. Therefore, the fact-finder using this method awards the plaintiff the amount it estimates he would have earned, and neither discounts the award nor adjusts it for inflation.[12]

II.

The *Culver I* opinion would have permitted the parties to pursue any of these methods in order to demonstrate to the fact-finder what adjustment, if any, should be made to compensate for increases in the plaintiff's future wages due to the economic factors summed up by the term inflation. Indeed, we endorsed the first method, involving specific forecasts of inflation's effect on a particular plaintiff's wages, as "simpler and more accurate" than the below-market discount approaches.[13]

The procedures necessary to determine the impact of future price inflation on a particular plaintiff on a year-by-

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[11] *See Pfeifer*, __ U.S. at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790; *Culver I*, 688 F.2d at 295-96.

[12] *See Pfeifer*, __ U.S. at __, 103 S.Ct. at 2554, 76 L.Ed.2d at 787; *Culver I*, 688 F.2d at 299 & n. 26; *see also Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). This was the approach adopted by the Third Circuit in *Pfeifer*. *See Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir.1982), *rev'd*, __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983).

[13] *See Culver I*, 688 F.2d at 298.

year basis are complex and time consuming. Elaborate expert testimony is required. The battle of economic experts is apt to shift the trial's emphasis from the determination of liability and the estimation of basic damages into the formulation of predictions concerning the national, indeed, global, economic future, including the liklihood of future increases or decreases in oil prices and the stability of foreign governments. Under *Culver I,* defendants were free not only to controvert the plaintiffs' damage calculations; they could also dispute the validity of the method by which the plaintiffs' experts calculated damages. If such a dispute evolved, the fact-finder would be required to decide which of at least two competing methods, each avouched by an expert, it would use to determine discount before applying the method it chose to determine the rate of discount, yet another determination to be based on contradictory expert testimony.

Different formulae, each thought to be theoretically accurate, might be applied in literally hundreds of individual cases because of the conclusions reached by different fact-finders. The results in otherwise similar cases would vary widely depending on the particular expert witnesses called, on the fact-finders' agreement or disagreement with the methods they advocated, and of the different fact-finders' evaluations of their testimony. The voyage in search of mathematical certainty would discover instead a continent of conflict and conjecture.

Anticipating these problems to some degree in *Culver I,* we expressed hope that the parties would, by agreement, eliminate the need to litigate many of these confusing issues:

In the great majority of cases, we believe, the

> parties can and will be able to stipulate to the methodology, discount rate, the admissibility of economic data, tables, etc. and other technical aspects, as well as to any particular issues of fact underlying the calculations.

Culver I, 688 F.2d at 311. We continue to express that hope. Nothing in this opinion prevents the parties from stipulating to any of these matters or to anything else that may affect the determination of damages. We cannot ignore the possibility, however, that in many, perhaps most, cases such stipulations will not be possible. This opinion determines only the method to be followed when the parties cannot agree.

In such cases, litigating in every instance the amount and the effect of future price inflation is not likely to produce the result that would have been obtained had the plaintiff not been injured.[14] No one can accurately predict the course of future inflation. A survey of the general literature for the past several years illustrates a sorry tale of repeated confusion, contradition and uncertainty in economic forecasts.[15] Current complaints about economic

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[14] *Cf. Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In *Liepelt* the Court held that juries should be permitted to consider the effect of income taxes on an award for lost future earnings, notwithstanding the complexity of that issue and the possible need for protracted expert testimony and debate. *Id.* at 494, 100 S.Ct. at 758, 62 L.Ed.2d at 694. In that case the difficulty of placing the issue before the jury was justified by the fact that the jury could reach a correct determination if the evidence was presented to them clearly. But there is no correct determination of inflationary trends. The court or the jury must reach what is at best an educated guess.

[15] *See, e.g.*, Grant, *Current / Yield*, Barron's 56, 70 (February 14, 1983); *Where the Big Economic Models Go Wrong*, Bus. Week 70 (March 30, 1981); *An Amazing Contradiction in Economic Prophecies*, Bus. Week 39 (May 28, 1979); *Inflation Defies the Guidelines*, Bus. Week 32 (February 12, 1979); *Mixed Grades for the Economists*, Bus.

forecasting generally concern relatively short-term forecasts. Over a longer term, events as diverse—and unpredictable—as spending to finance a Southeast Asian war, an oil embargo, disagreement between members of the oil cartel, or a drought causing widespread agricultural failures could profoundly increase inflation.[16] A major depression or the discovery of significant and inexpensive fuel resources might reduce its present impact.

Whether or not the science of economics continues to be dismal,[17] it is assuredly in this regard conjectural. The case-by-case method sacrifices efficiency and simplicity for

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(Footnote 15 continued)
Week 30 (December 25, 1978); *Theory Deserts the Forecasters*, Bus. Week 50 (June 19, 1974); Forbes, *Economics Shouldn't Be a Branch of Mathematics*, Forbes 21 (January 18, 1982); *If We Don't Know Where We Are, How Can We Tell Where We Are Going*, Forbes 119 (April 2, 1979); *Stockman's Ladder*, Newsweek 66 (February 9, 1981); *Black-Box Forecasting*, Time 92 (February 23, 1981). Even the Council of Economic Advisors has conceded that "its ability to forecast inflation is at best imperfect." *The Economic Report of the President* 1976, at 20; *see also* Council of Economic Advisors, *Economic Report of the President* 1982, at 215 (admitting federal government cannot fully anticipate the course of the economy); Solow, *The Intelligent Citizen's Guide to Inflation*, Public Interest 49 (Winter 1975) (suggesting we may be less able to predict price levels 5-10 years into the future than in the past when stable prices were the norm).

On September 14, 1981, the date we heard oral argument *en banc* in *Culver I*, the prime lending rate was 20.5 percent and the annual rate of inflation was 14.8 percent. On August 1, 1983, the prime lending rate was 10.5 percent. For the first six months of 1983, the annual rate of inflation has been only 2.9 percent.

[16] *See* W. Branson & J. Litvack, *Macroeconomics* 408-14 (1976); *Economic Report of the President* 1978, at 139-42. *Cf. Economic Report of the President* 1974 ("increasingly complex and interdependent world" increases difficulties in forecasting inflation); *Inflation Defies the Guidelines*, *supra* note 4 (discussing variety of factors affecting inflation).

[17] T. Carlyle, *Latter-day Pamphlets* no. 1 (1850).

pursuit of a "delusive exactness."[18] As the Court noted in *Pfeifer:* "It is perfectly obvious that the most detailed inquiry can at best produce an approximate result."[19]

The inherent inaccuracy of specific forecasts of future inflation, coupled with the length and complexity of the proceedings necessary to engage in such forecasts, convinced the Supreme Court that the case-by-case method of adjusting damage awards for inflation "should be discouraged."[20] "[S]ince specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of [plaintiffs'] resources to make such forecasts the centerpiece" of accident litigation.[21] Recognizing the Court's disapproval of the case-by-case method, we hold that it should not be used in this circuit to adjust damage awards for inflation.

III

The paramount concern of a court awarding damages for lost future earnings is to provide the victim with a sum of money that will, in fact, replace the money that he would have earned. Arriving at a reasonable estimate of anyone's financial future involves estimates of a whole spectrum of factors. We commonly exclude many relevant factors from consideration on the basis that they are so speculative that

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[18] *See Pfeifer,* __ U.S. at __, 103 S.Ct. at 2558, 76 L.Ed.2d at 792 (quoting *Feldman v. Allegheny Airlines, Inc.,* 524 F.2d 384, 392 (2d Cir. 1975) (Friendly, J., concurring dubitante)).

[19] *Pfeifer,* __ U.S. at __, 103 S.Ct. at 2558, 75 L.Ed.2d at 792.

[20] *Id.* at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790.

[21] *Id.*

they cannot accurately be determined. For example, we consider only work-life expectancy and do not take into account the possibility that a worker will change to work that is more pleasurable but pays less. When considering the loss suffered as a result of the death of a wage-earner, we do not consider the likelihood that a widowed spouse may remarry.[22] Nor do we take into account the stability of an already accomplished remarriage, or the age, appearance or personality of the surviving spouse.[23]

While factors such as these do in fact affect the loss of future income, we place a higher value on a reasonable and workable system for establishing damages than we do on detailed precision in arriving at an award. "[W]e must remember that the ultimate total damage figure awarded is the sum of a series of predictions, none of which involves mathematical certainty, and that it is the reasonableness of the ultimate figure that is really in issue in such a case as this." *Barnes v. United States,* 685 F.2d 66, 70 (3d Cir.1982) (quoting *United States v. Furumizo,* 381 F.2d 965, 970 (9th Cir.1967)).[24]

"[I]f forecasts of future price inflation are not used, it is necessary [for the fact-finder] to choose an appropriate

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[22] *See, e.g., Bailey v. Southern Pac. Transp. Co.,* 613 F.2d 1385, 1388 (5th Cir.1980) (applying Texas law); *City of Brady v. Finklea,* 400 F.2d 352, 358 (5th Cir.1965) (same). *See generally* Annot., 88 A.L.R.3d 926 (1978); Annot. 87 A.L.R.2d 252 (1963).

[23] *See, e.g., Kalavity v. United States,* 584 F.2d 809, 822 (6th Cir.1978) (dictum; applying Ohio law).

[24] *See also Pfeifer,* __ U.S. at __, n. 34, 103 S.Ct. at 2558 n. 34, 76 L.Ed.2d at 792 n. 34 ("Throughout this opinion we have noted the many rough approximations that are essential under any manageable approach to an award for lost earnings.").

below-market discount rate."[25] Adoption of this method guards against the wide disparity in results, the extended duration in trial time, and the increased cost to the parties that may be anticipated if a specific forecast of future price inflation is made anew in each case involving loss of future earnings. It achieves a no more uncertain approximation of inflation's effect on the damage award. Because it does not attempt a specific forecast of how inflation will affect the particular plaintiff before the court, however, it is less complex and time consuming.

Even establishing an appropriate below-market discount rate, however, is difficult. Economists do not yet fully understand the relationship between inflation and interest. Recent studies discredit the received wisdom, voiced a decade ago, that there is a constant real rate of interest that can be determined merely by filtering inflationary expectations from nominal interest rates.[26] However, while the studies find that the real rate varies, estimates uniformly fix its amount over any fairly lengthy period as falling into a range that runs from three percent to a negative rate of -1.5%.[27]

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[25] *Pfeifer*, __ U.S. at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790.

[26] For examples of the most recent scholarship, *see* Wilcox, *Why Real Interest Rates Were So Low in the 1970's*, 73 Am.Econ.R. 44 (1983); Fama & Gibbons, *Inflation, Real Returns and Capital Investment*, 9 J. Monetary Econ. 297 (1982); Mishkin, *The Real Interest Rate: An Empirical Investigation*, National Bureau of Economic Research Reprint No. 243 (1981).

[27] *See Pfeifer*, __ U.S. at __ nn. 30 & 31, 103 S.Ct. at 2556-57 nn. 30 & 31, 76 L.Ed.2d at 790-91 nn. 30 & 31; *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1199 (7th Cir.1982); *Doca*, 634 F.2d at 39 & n. 10 (collecting economic studies); *Feldman v. Allegheny Airlines Inc.*, 382 F.Supp. 1271, 1293 (D.Conn.1974), *aff'd*, 524 F.2d 384 (2d Cir.1975). In an article recently published in the *American Economic Review*, an economist estimated the real rate between 1960 and 1973 at 1.3%.

We hold that fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method. The parties may, if they wish, stipulate the below-market discount rate, as they may stipulate any other disputed issue. If they are unable to do so, they may introduce expert opinion concerning the appropriate rate. Other evidence about the effect of price inflation is inadmissible. Evidence about the likelihood that the earnings of an injured worker would increase due to personal merit, increased experience and other individual and societal factors continue, of course, to be admissible.[28] We recognize that the Supreme Court declined in *Pfeifer* to select a single

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(Footnote 27 continued)
Wilcox, *Why Real Interest Rates Were So Low in the 1970's*, 73 Am.Econ.R. 44, 45 (1983) (Table 1).

Interestingly, Wilcox also estimated that between 1974 and 1978, the real rate was -0.8%. 73 Am.Econ.R. 44, 45. Professor Mishkin recently summarized the movement of the real rate over the last twenty-five years:

> [T]he real rate tended to be positive in the first twenty years of the sample period [1953-1973], with a declining trend from 1953-1956, and upward trend reaching a maximum in the boom years of the mid-1960's, and a declining trend thereafter...The real interest rate appears to turn negative towards the end of 1972 and the downward trend accelerates through the end of 1974, whereupon the real rate stays negative but has no easily discernible trend.

Mishkin, *supra* note 11, at 168-70. However, his estimates suggest that the real rate has varied within the relatively narrow range between approximately two percent and approximately negative three percent. *Id.* at 171 (figure 2). Within the last year, we have witnessed what appears to be a dramatic change in the real rate. estimates of inflation hover about an annual rate of 5%. Long-term U.S. securities yield 11% or more in interest. Scholarly economic writings that consider the effect of these developments in economic theory have not yet appeared. However, this development, which had not been forecast, indicates further the uncertainties in economic forecasting.

[28] *See Pfeifer*, __ U.S. at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790; *Culver I*, 688 F.2d at 305 n. 39.

method of accounting for inflation. We are confronted, however, with the need to adapt that opinion to jury trials. We also think it desirable to afford litigants and the courts the opportunity to determine the actual operation of this less complex method in order that its efficacy for national use can be determined.

As we have noted, the discount rate may be affected by the fact-finder's assumption about the type of investment the plaintiff will choose, for long-term investments usually yield higher nominal interest rate returns than short-term investments of the same quality. The Supreme Court having said in *Pfeifer* that it perceives "no intrinsic reason to prefer one assumption over the other," we mandate neither.[29] However, the fact-finder should not consider the plaintiff's possible need for emergency funds as a factor in favor of short-term investments; the injured wage-earner should have no greater right to a resource against future emergencies than he would have had if he had continued to work.

In judge-tried cases, a trial court adopting a pre-tax discount rate between one and three percent will not be reversed if it explains the reasons for its choice.[30] This guideline, however, goes only to the reasonableness of the correlation between the pre-tax market rate of interest and the inflation rate. As discussed above, this pre-tax discount rate must then be adjusted for tax effects. If supported by appropriate expert opinion, the trial judge might make no discount or even adopt a negative rate not to exceed -1.5% before adjusting for tax effects. In jury trials, the jury

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[29] *Pfeifer*, __ U.S. at __ n.23, 103 S.Ct. at 2552 n. 23, 76 L.Ed.2d at 785 n. 23.

[30] *Pfeifer*, __ U.S. at, 103 S.Ct. at 2556, 76 L.Ed.2d at 790.

should be instructed in the usual fashion concerning the weight to be given expert opinion evidence. The jury may then be permitted to return a single-figure award for damages or it may be required to answer interrogatories stating, among other items, the amount of loss of future earnings for each year for which it makes an award, and the discount rate it chooses to apply. The court will then be able to compute the total award or to require the parties to complete the arithmetic.

IV.

Just as we cannot ignore the reality of inflation, we cannot ignore the fact that long term economic conditions may change or that economic forecasting may become more certain. We recognize too that, although both the Fifth and Eleventh Circuits will be bound by this decision, Congress has declared that we are no longer a single court.[31] It fulfills rather than ignores the will of Congress to acknowledge that, in the future, either circuit *en banc* will be free to reconsider this decision. Should counsel for any party in any future case think this decision no longer reflects long-term economic facts or contemporary economic theory, a proffer of evidence may be made in the trial court to preserve the issue for an appellate panel and, thereafter, for *en banc* consideration.

Although we adopt a single method for adjusting future damage awards, our ruling, made on application for rehearing, shall not apply to any case in which, before the date this opinion was published, either a jury returned a

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[31] *See Banco Nacional De La Vivienda v. Cooper*, 680 F.2d 727, 730 n. 3 (11th Cir.1982); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982). *See also* The Fifth Circuit Court Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995.

verdict after being instructed on the basis of the principles set forth in *Culver I*, or a judge made findings of fact fixing damages pursuant to those principles.

For these reasons, Parts I through VI of our prior *en banc* decision, 688 F.2d 280, 283-95, are reaffirmed. The rule announced in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.) (en banc), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975), is overruled. We withdraw, however, Parts VII through XII of our decision in *Culver I*. 688 F.2d at 295-311. The views expressed in this opinion shall govern the adjustment of federal damage awards for future lost earnings in this Circuit.

Courts are not prophets and juries are not seers. In making awards to compensate injured plaintiffs or the dependents of deceased workers for loss of future earnings, however, these fact-finders must attempt, in some degree, to gauge future events. Absolute certainty is by the very nature of the effort impossible. It is also impossible to take into account every bit of potentially relevant evidence concerning the tomorrows of a lifetime. The approach we adopt attempts to assure plaintiffs a fair measure of damages, to give defendants a reasonable adjustment for reducing future losses to present value, and to avoid making trials even more complex and their results even more uncertain. It is the product of a balancing of competing values. Ultimately, however, that is the root of all justice.

The judgments in *Culver*, No. 79-3985, and *Byrd*, No. 78-3064, are REVERSED, and the cases are REMANDED to the district court for further proceedings on the issue of damages. The panel opinions are adopted in all other respects.

JOHN R. BROWN, Circuit Judge, with whom FAY, POLITZ, R. LANIER ANDERSON, III, RANDALL, TATE, SAM D. JOHNSON and JERRE S. WILLIAMS, Circuit Judges, join, dissenting:

With the ink scarcely dry on *Pfeifer* (*Jones & Laughlin Steel Corp. v. Pfeifer*, __ U.S. __, __, 103 S.Ct. 2541, 2554, 76 L.Ed.2d 768, 788 (1983)), in which, with remarkable unanimous clarity, the High Court chose *not* to pick one of the several methods in its collective economic hat it considered legally sound for calculating lost future wages in civil damage actions and instead chose to leave that crucial decision to the trial judge in that and future cases, a majority of this Court elevates one approach beyond any choice to be the only way, for mandatory application in eighteen[1] federal judicial districts across a half-dozen Southern states, for a broad group of litigants to arrive at fair sums of money to compensate injured parties. Guided by the decision of *Pfeifer*, its approval of *Culver I*, and the direction that the choice of methodology should be left to the district court, not this Court, I respectfully dissent.[2]

I.

In overruling *Penrod* (*Johnson v. Penrod Drilling Co.*,

[1] This is likely the last opinion of the "old" Fifth Circuit, binding on all district courts in the present Fifth and Eleventh Circuits. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) (panel decisions of former Fifth Circuit rendered prior to September 30, 1983 are binding precedent); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982) (all en banc decisions of former Fifth Circuit are binding precedent).

[2] Though I of course agree with the result of the majority opinion, that the judgment below be reversed to overrule *Penrod*, the drastic modification of *Culver I* and disregard of *Pfeifer* nevertheless compels me to dissent.

510 F.2d 234 (5th Cir.) (en banc), *cert. denied* 423 U.S. 839, 96 S.Ct. 68-69, 46 L.Ed.2d 58 (1975)) which forbade proof, argument, or jury instruction concerning inflationary factors in damage awards in actions under maritime or federal law, "it [was] not our purpose to establish a single methodology" for all federal courts in the Old Fifth to thenceforth account for such factors in determining future lost earnings. *Culver v. Slater Boat Co.*, 688 F.2d 280, 305 (5th Cir.1982) (en banc) (Culver I). Rather, we adopted a "flexible approach to the problem which [w]ould result in fairness regardless of the economic circumstances that exist at the time of trial" and left open the opportunity for each party to offer relevant evidence supporting or refuting any of the several discussed theories of calculating lost earnings. *Id.* at 286. "In the dynamic and ever-changing world of finance and economics," we felt that "any standard which is inflexible...will likely be unable to cope with the problem of preventing windfalls either to plaintiff or defendant." *Id.* at 300. Our goal was "to create standards that are fair to both sides of the controversy, with the trier of fact being allowed to receive and act upon credible evidence of the economic facts bearing, pro and con, on the competing theories." *Id.*

Pfeifer, on the heels of *Culver I,* clearly follows this flexible approach. The Supreme Court unequivocally refused to establish anything but "the general boundaries within which a particular award will be considered legally acceptable,"[3]

[3] The Supreme Court was squarely faced with the same choice before this Court today.

> The litigants and the amici in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy.

U.S. at __, 103 S.Ct. at 2555, 76 L.Ed.2d at 789, simply because no one method of calculating lost earnings was above some legitimate criticism and thus appropriate for all cases.

The Court questioned certain aspects of each of the three principal proposed methods, making it clear that under some circumstances one or more of the three could be inappropriate. (i) It thought that methods employing specific forecasts of future inflation on a case-by-case basis "remain too unreliable to be useful in *many* cases," __ U.S. at __, 103 S.Ct. at 2556, 76 L.Ed.2d at 790 (emphasis added), and discouraged their general use. (ii) As to the real interest (or below-market) discount rate approaches, the Court found the "economic evidence distinctly inconclusive regarding an essential premise of those approaches," *id.*— the "key premise...that the real interest rate remains stable over time." Such a rate is "obviously not perfectly stable," and, the Court observed, "whether it is even *relatively* stable is hotly disputed among economists," *Id.* at __ n. 30, 103 S.Ct. at 2556 n. 30, 76 L.Ed.2d at 790 n. 30; *accord Culver I,* 688 F.2d at 302 ("As evidence becomes available that the next 20 or 30 years will not be like the past 20 or 30 years, then the *Feldman* approach is less helpful."). Even the majority recognizes this.[4] (iii) Lastly, it "was not

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(Footnote 3 continued)
__ U.S. at __, 103 S.Ct. at 2555, 76 L.Ed.2d at 789. Like that Court I am "not persuaded, however, that such an approach is warranted." *Id.*

[4] Even establishing an appropriate below-market discount rate, however, is difficult. Economists do not yet fully understand the relationship between inflation and interest. Recent studies discredit the received wisdom, voiced a decade ago, that there is a constant real rate of interest that can be determined merely by filtering inflationary expectations from nominal interest rates.

See supra at 16123.

prepared to impose [the "total offset" approach] on unwilling litigants," as had the Third Circuit below, for such approaches rely on at least one assumption the Court could not unquestioningly accept—that "the national patterns of wage growth are likely to reflect the patterns within any given industry." __ U.S. at __, 103 S.Ct. at 2557, 76 L.Ed.2d at 791-92; *cf. Culver I,* 688 F.2d at 299 ("penalizes defendants because...interest rates on relatively safe investments will typically ride several percentage points above the rate of inflation"). To the Court, "[t]he legislative branch of the federal government [was] far better equipped than [it] to perform a comprehensive economic analysis and to fashion the proper general rule." __ U.S. at __, 103 S.Ct. at 2557, 76 L.Ed.2d at 792. Importantly, though, the Court characterized each of the three methods as "legally acceptable."

Consequently, the Court chose to allow to the trial judge on remand discretion to apply in a deliberate choice any one or more of the "legally acceptable" methods the Court discussed—those involving specific forecasts of future inflation, those using a below-market or real interest discount rate, or those based on the notion of total offset. This is precisely what *Culver I* ordained: no one method was either prescribed or forbidden. And *Pfeifer* approved *Culver I.*[5]

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[5] Of course, *Pfeifer* did point out, __ U.S. at __ n. 27, 103 S.Ct. at 2554 n. 27, 76 L.Ed.2d at 787 n. 27, an error in steps (2) and (3) in this Court's illustrative summary of computation of lost earnings in *Culver I. See* 688 F.2d at 309 (concerning "average annual income"). Unavoidably cast in general terms, that summary would have led to significant error. Since averaging the normally increasing estimated annual income stream would raise estimates for the early years and lower them for the later years, and since early years are discounted less that later years, averaging would unjustifiably increase the award to plaintiffs. In the year since *Culver I* was handed down, I have valiantly made every effort to correct this error.

II.

Despite the clear holding in *Pfeifer* and its approval of *Culver I*'s approach, the majority today declares that, though "the Supreme Court declined in *Pfeifer* to select a single method of accounting for inflation," unless the parties can stipulate to the contrary, all "fact-finders in this Circuit must adjust damage awards to account for inflation according to the below-market discount rate method." *See supra* at 16123. The Court takes from the district court—and puts squarely in the hands of the Court of Appeals—the responsibilitiy of choosing, from among competing economic theories, the methodology or methodologies which could be used to most equitably and adequately determine future lost earnings under the circumstances of that case. Apparently this is done to spare jurors from the rigors of listening to presentations on such competing methods (which the Court seems "convinced" will invariably turn into "graduate seminar[s] on economic forecasting," *see supra* at [m/s at 4]), and from the difficulty of making such reasoned choices. In doing so, the Court makes choices of economic fact "hotly disputed [even] among economists."

Pfeifer, like *Culver I,* however plainly evidences a confidence that trial courts[6] are fully capable and actually better able to make such difficult decisions on the facts of individual cases, at least until Congress declares otherwise.

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[6] I read nothing in *Pfeifer* which would prevent a trial judge from choosing the appropriate economic theory for calculating lost future earnings in a jury trial, based on the proof put forward by the parties. To me, however, *Pfeifer* leaves no room for this Court to make a similar decision for all cases for all time without any consideration of the circumstances of a particular case.

I thus must dissent.[7]

R. LANIER ANDERSON, III, Circuit Judge, dissenting:

Although I personally approve of the approach outlined by Judges Rubin and Frank M. Johnson, and would recommend it to district courts in this circuit, I agree with Judge Brown that the Supreme Court in *Jones & Laughlin Steel Corp. v. Pfeifer*, __ U.S. __, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983), has disapproved of that approach. Accordingly, I join Judge Brown's dissent.

TJOFLAT, Circuit Judge, dissenting:

In *Culver*, No. 79-3985, I continue to adhere to my view that appellants are not entitled to a new trial. *Culver v. Slater Boat Co.*, 688 F.2d 280, 315 (5th Cir.1982) (en banc) (Culver I) (Tjoflat, J., dissenting).

In *Byrd*, No. 78-3064, I join in Judge Brown's dissenting opinion.

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[7] Beyond disagreeing with the majority's annointment of one method over the other "legally acceptable" rules for calculating lost earnings, I simply point out that whether the majority has made the correct choice is problematic. *See, e.g.* Zocco & Ledford, Penrod *Overruled: Implications and Shortcomings in* Culver *regarding the Determination of Economic Damages*, 29 Loy.L.Rev. 37, 47-53 (1983) (authors recommend adoption of the "expected inflation method" as "the *Feldman* method [using a below-market discount rate and adopted by the majority here]...is merely *Penrod* in disguise"); also *see* the criticisms of that theory in *Pfeifer*, __ U.S. at __, 103 S.Ct. at 2556, n. 30, 76 L.Ed.2d at 790-91, n. 30; and *Culver I*, 688 F.2d at 300-02. That the below-market discount rate method may be inappropriate under some (or most) circumstances is only further evidence supporting the flexible approach of *Culver I*.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

NO. 78-3064

WILLIE MAY BYRD, As Administratriz
of the Estate of Lawrence Byrd, deceased,

Plaintiff-Appellant-Cross-Appellee,

versus

HEINRICH SCHMIDT REEDEREI,

Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court for the
Middle District of Florida

NO. 79-3985

RUTH CULVER, ET AL.,

Plaintiffs-Appellants-Cross-Appellees,

versus

SLATER BOAT CO., ET AL.,

Defendants-Appellees-Cross-Appellants

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 4, 1980

EUROPIRATES INTERNATIONAL, INC., ET AL.,

Defendants-Appellees and Cross-Appellees-Appellants,

versus

ODECO DRILLING, ET AL.,

Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING
(Filed Feb. 24, 1984)

Before GOLDBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.**

PER CURIAM:

IT IS ORDERED that the petitions for rehearing

** Judge Garza participated in the first en banc hearing but senior status on July 7, 1982. He, therefore, did not participate in the first en banc decision. Subsequently, he became qualified to sit by virtue of the 1982 amendment to 28 U.S.C. § 46(a). He has, however, elected not to participate.

Judges Garwood, Jolly, Higginbotham, and Davis joined the Court after submission and oral argument and elect not to participate.

filed in the above entitled and numbered causes be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/S/ Signed
UNITED STATES CIRCUIT JUDGE

APPENDIX "C"

Ruth CULVER, et al.,

Plaintiffs-Appellants Cross-Appellees,

v.

SLATER BOAT CO., et al.,

Defendants-Appellees Cross-Appellants,

EUROPIRATES INTERNATIONAL, INC., et al.,

Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, et al.,

Defendants-Appellees Cross-Appellants.

No. 79-3985

United States Court of Appeals,
Fifth Circuit*

Sept. 22, 1982.

Wife and children of foreman of anchor-pulling crew brought maritime personal injury case arising out of foreman's death. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., entered judgment from which appeals and cross appeals were taken. The Court of Appeals affirmed as modified, 644 F.2d 460. On rehearing en banc, the Court of Appeals

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Brown, Circuit Judge, overruling a previous case, held that: (1) prohibition of any consideration of inflationary factors in ascertaining damages award for loss of future wages is unfair to plaintiffs and would be overruled, an (2) in ascertainment of damages for loss of future wages, plaintiffs should be permitted to establish by factual economic and labor data, and expert testimony, that their income would probably continue to increase in response to inflation in future years if they continue to work, and likewise, using economic and labor data and expert testimony, defendant should be permitted to rebut such evidence.

Reversed and remanded.

James C. Hill, Circuit Judge, filed opinion concurring in part and dissenting in part, in which R. Lanier Anderson, III, Circuit Judge, joined.

Charles Clark, Circuit Judge, dissented and filed opinion in which Roney and Gee, Circuit Judges, joined.

Gee, Tjoflat and Frank M. Johnson, Jr., Circuit Judges, dissented and filed opinions.

Appeals from the United States District Court for the Eastern District of Louisiana.

ON REHEARING EN BANC

Before GODBOLD, Chief Judge, BROWN, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D.

JOHNSON, THOMAS A. CLARK and WILLIAMS, Circuit Judges.**

JOHN R. BROWN, Circuit Judge:

This case comes before us on rehearing en banc to consider whether the holding of this Court in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), that neither proof, nor argument, nor jury instructions concerning inflationary factors may be considered or used in maritime, Jones Act, and FELA personal injury and wrongful death actions, should be overruled.[1] After careful consideration of this singular issue, we overrule *Penrod* and remand this case to the District Court.

I.

Bound by Penrod

The facts leading up to this appeal have already been outlined by this Court in the panel's opinion, 644 F.2d 460, 462-63 (5th Cir. 1981). Briefly, Curtis Culver was killed while working on a vessel owned by Slater Boat Company. The vessel upon which the accident took place was engaged in moving the drilling barge OCEAN QUEEN from its

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**Judge Garza participated in the panel opinion and in the en banc hearing but took senior status on July 7, 1982 and is no longer qualified to participate in the en banc decision.

Judges Garwood, Jolly and Higginbotham joined the Court after submission and oral argument but do not choose to participate.

[1] Another case involving the same issue, *Byrd v. Heinrich Schmidt Reederei*, 638 F.2d 1300, *on reh'g en banc*, __ F.2d __ (5th Cir. 1982) (en banc) [No. 78-3064, slip op. at 15699, 15700, 1982], was consolidated with the present case on rehearing en banc. The *Byrd* opinion appears on the pages immediately following this opinion.

location on the Outer Continental Shelf to a new location. The fatal injury occurred before the barge was actually moved. Culver's widow and children brought suit under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.*, and the general maritime tort and negligence theory. The jury found negligence on the part of Gulf Overseas Marine Corporation (Culver's employer), Euro-Pirates International (the charterer of the vessel), and Ocean Drilling & Exploration Company (the owner of a barge involved in the fatality), and no contributory negligence on the part of Culver.

On the issue of damages, the District Court allowed testimony concerning discount rates and the earning power of money invested in low risk bonds. The jury was instructed to "discount the total amount" of any award by a percentage that represented an appropriate rate of interest. In answer to the special interrogatory submitted asking what discount percentage rate was applicable, the jury filled in "25%". The trial judge, on the basis that the jury obviously misunderstood the interrogatory, substituted 9.125%, the only other rate put into evidence by the defendant. In accordance with *Penrod*, the District Court did not allow testimony, charges, or interrogatories to be submitted on the effects of inflation on probable loss of future income.

In short, Culver was not permitted to show any likely increase in future earnings due to inflation. But the award was to be discounted by an interest factor reflecting anticipated inflation.

Culver initially appealed the judgment, raising five issues: (i) should *Penrod* be overruled?; (ii) if *Penrod* is not overruled, should evidence of probable non-inflationary

future wage increases (e.g. merit raises) be prohibited?; (iii) can a District Court disregard a jury finding regarding the discount rate and apply one based on opinion testimony?; (iv) was the testimony of Culver's adverse witness sufficiently clear that the court could apply that witness' opinion of the discount rate?; and (v) can a District Court enter a final judgment for damages applicable to all beneficiaries in a maritime death action that is incapable of apportionment among the various beneficiaries?[2] Cross-appeals were brought by all of the defendants raising several additional issues.[3]

Oral argument was heard by a panel of this Court, and the District Court judgment was affirmed as slightly

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[2] Briefly, Culver objected to the special interrogatory, which asked the jury to find the amount that "will fairly and adequately compensate *Mrs. Culvaer and her children* for their damages," on the grounds that it was impossible for the jury to separate the losses suffered by the children from those suffered by Mrs. Culver. Because a wrongful death action in Louisiana is a new cause of action by the survivors, and not a part of the decedent's estate, La. Civ. Code Art. 2315, Culver argued that damages must be apportioned outside the probate courts. This argument raised the issue of whether Louisiana law applied at all, in light of Culver's Jones Act and DOSHA claims. DOHSA, for example, specifically provides for apportionment by the Court. 46 U.S.C. § 762. The defendants argued that a new trial on this issue could be avoided by permitting the District Court or a state court to apportion the award. The panel found that the record contained no evidence on which a jury could have based an apportionment, and that this maritime action was an improper vehicle to apportion the award. 644 F.2d at 465. We need not decide this issue because of our remand for a new trial on damages, at which time the District Judge may properly frame the issue for Culver's various claims. *See* note 6, *infra*.

[3] The following issues were raised on cross-appeal: (i) was it proper for the District Court to submit a liability question under the DOHSA, 46 U.S.C. § 761, to a jury?; (ii) was there substantial evidence to support the jury verdict against the defendants?; (iii) did the District Court fail to find a right of indemnification among the defendants?; and (iv) was there sufficient evidence to establish William Culver as a child of the decedent?

modified. Specifically, the panel considered itself bound by *Penrod*'s holding that "the influence on future damages of possible inflation or deflation is too speculative a matter for juridical determination." 644 F.2d at 643, *quoting penrod*, 510 F.2d at 241. And in accordance with *Byrd v. Reederei*, 638 F.2d 1300 (5th Cir. 1981) (rehearing en banc granted), the panel rejected Culver's argument that the Supreme Court overruled *Penrod* in *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).[4] Likewise, the panel found no error in the trial judge's refusal to allow Culver to argue likely future wage increases on the basis of merit, because no evidence was offered to show that such an argument was warranted and, in addition, such evidence was "merely an indirect way of putting inflation factors into evidence before the jury [which is] not allowed under *Penrod*." 644 F.2d at 464.[5]

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[4] In *Liepelt*, the Supreme Court stated;

> [F]uture interest rates, and future inflation are...matters of estimate and prediciton. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in the form that is understandable by juries that are increasingly familiar with the complexities of modern life.

444 U.S. at 494, 100 S.Ct. at 758, 62 L.Ed.2d at 694. This Court in *Byrd*, 638 F.2d at 1308, held that "*Liepelt's* favorable dicta is only that."

[5] In addition, the panel found no error in the District Court's substitution of 9.125% for 25% as the discount rate to be applied to the jury's award, because Culver did not offer discount rate evidence and the court's adoption of the rate suggested by the defendants' expert was a proper exercise of discretion. 644 F.2d at 464-65. As to apportionment of damages, the panel found this maritime action an improper vehicle to apportion the award, especially since the record contained no evidence on which the jury could have based its apportionment. 644 F.2d at 465. The panel also found sufficient and adequate evidence to support the verdict on liability. The defendants' arguments as to indemnity on the

Culver filed a petition for panel rehearing,[6] and a separate petition for rehearing en banc, as required by our rules, raising two closely related issues: (i) should *Penrod* be overruled and (ii) does *Penrod* prohibit a trier of fact in this Circuit to receive evidence of non-inflationary factors, such as probable merit raises and productivity increases, in arriving at future losses? This Court, voting for rehearing en banc, determined that the time was ripe for reconsideration of the rule in *Penrod* pertaining to the "inflation factor" in damages awards. Although Culver's brief to this court on rehearing en banc addressed primarily issue (i), whether proof and argument concerning inflationary factors

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(Footnote 5 continued)
basis of the active/passive negligence theory, was likewise found to be without merit. 644 F.2d at 465-66. Finally, the claim by one defendant for a reduction in the damage award based upon the trial judge's finding of comparative negligence on the part of Culver was found by the panel to be unsupportable and that portion of the judgment was modified. This claim for reduction was based on the finding, in the indemnity phase of the case, that Culver's employer was actively negligent because of the failure of its employee (Culver) to stay in a position of safety. Yet the jury found Culver free from negligence, and the panel held that the jury determination should prevail. 644 F.2d at 465.

Except as to those issues concerning the damages award which will be decided on remand, we adopt all of the panel's findings and conclusions.

[6] The petition for panel rehearing asserted three errors: (i) it was improper for the trial judge to adopt the opinion testimony of defendants' witness as a basis for discounting the jury award, (ii) it was statutorily necessary that the awards be apportioned by the trier of fact, and (iii) sufficient evidence was presented such that the jury could have apportioned damages.

These issues, all relating to the damages award, need not be reached because of our decision to reverse and remand the case for a new trial on the question of damages. Specifically, we leave to the District Court initially the proper handling of the apportionment issue, bearing in mind the respective beneficiaries, adult and minor, and the respective bases for liability; Jones Act, DOHSA, Maritime law and Louisiana Law.

should be permitted in this Circuit, issue (ii) is also involved since automatic exclusion of evidence of probable merit raises has resulted from a misreading of *Penrod*. The defendants argue that *Penrod* should be upheld, and, in addition, contend that Culver waived the right to relief on the inflation issue by failing to make an offer of proof regarding the likelihood of inflation.

A.

Briefly, we will address the defendants' claim that Culver waived the right to raise the issue of inflation by his failure to make a formal proffer at trial. The defendants called as a witness an investment banker who specialized in bonds. On cross-examination, Culver's attorney attempted to ask whether people earned more money over the years of their employment due only to productivity. An objection to the question was sustained. After several more questions, all counsel approached the bench where the judge made it clear that the type of evidence excluded in *Penrod* would not be permitted in court. The jury was then temporarily excused, and Culver's attorney told the judge that he wanted to ask the expert whether the principal of a bond would be worth less in the future. The trial judge replied that deflation was as likely as inflation, and any testimony as to such factors would be pure speculation. The judge concluded that "I will not permit you to introduce any evidence before the jury relative to inflation in view of the present law that I am bound by which is the *Penrod* case." Before closing argument, and before the jury returned, the judge explained that:

> Plaintiff's counsel will not be permitted to argue that the jury should take into consideration inflation, nor will it be permitted to make an indirect

> argument which would achieve the same purpose of permitting him to argue inflation by attempting to indicate that it could be expected that plaintiff would receive job promotions or merit increases.

Again, the judge mentioned the prohibitions of *Penrod.* Given this flat prohibition against introducing testimony (or making argument) as to future inflationary trends on the basis of *Penrod,* it makes no sense to argue that Culver may not raise this issue on appeal simply because he did not proffer an expert on inflation. Reading the trial transcript, it is obvious that a record was being created to challenge or at least find an exception to *Penrod.* We find that the matter was suffficiently presented to the judge at trial and that all parties understood the dilemma—Culver wanted the jury to consider inflation, and *Penrod* stood in the way.

B.

The most problematic issue on this appeal remains: Should *Penrod* be overruled so as to allow parties to present proof and argument concerning inflationary factors to the trier of fact? Our analysis will begin with a brief review of the *Penrod* decision. In order to illustrate graphically the implications of *Penrod* and why it has to be overruled, we will discuss many of the cases in this Circuit where *Penrod's* prohibitions were effective. Next, we will summarize the criticisms of *Penrod* which come from other circuits as well as commentators. As our analysis proceeds, it will become clear that the problem is one of fairness to plaintiffs as well as defendants in the trial process. Personal injury awards, once they have been calculated on the basis of projected income and life expectancy, are paid

immediately to the plaintiff. It is well-known that if a plaintiff (or his beneficiaries) receives a lump-sum award, totaling the income that the plaintiff would have received throughout the rest of his work life, that money can be invested so as to yield a far greater amount than the initial award. This would be unfairly liberal to the plaintiff. Consequently, the law traditionally permits introduction of testimony, usually by an expert in financial matters, that the lump-sum should be discounted by a factor equal to the interest rate which could likely be earned on a relatively safe investment by an unsophisticated investor. The total projected earnings are thus reduced to the present cash value. However, it will be demonstrated that in an inflationary economy, discounting an award in this manner results in unfairness to a plaintiff or his beneficiaries. When a discount rate is applied to an award in an economy where wage-earners typically receive cost of living increases each year due to inflation, the plaintiff will not be adequately compensated for his loss of future income—inflation will erode the value of the award, and no adjustment for cost of living can be made even though wages continue to increase throughout the economy. On the other hand, if courts respond to this dilemma by refusing to apply a discount rate, as some have, the result would be unfairness to defendants. Quite simply, plaintiffs are to be compensated, by a culpable tortfeasor, but should not be over- or under-compensated. Likewise, defendants found liable should pay no more or less than the amount a plaintiff lost because of the injury. Keeping in mind the goal of fairness to both sides of a controversy, this opinion will consider alternatives and possible guidelines for use in this Circuit. We will establish a flexible approach to the problem which should result in fairness regardless of the economic circumstances that exist at the time of trial. In the process, we overrule *Penrod*.

II.

Prolegomena

It is crucial to keep in mind that this is really an economic, and not a legal problem. The likelihood of future wage increases, whether given on the basis of productivity, merit advancement, or inflation, or a combination of them, does not have anything to do with the law. The legal question whether such matters should be considered by the courts is a foundational policy question, the answer to which will be influenced by recourse to the financial and economic community. At trial, the issue may well be a legal credibility of witnesses or competency of evidence, but a pronouncement that inflation is speculative or that workers will or will not receive productivity and merit raises is essentially an economic statement, not a declaration of law.

If we consider, as an example, a person totally and permanently injured by a defendant's negligence, the injured worker is entitled to the equivalent of his lost future earnings. The law decides that much, and the question remains how much money should be given to him now. Once a lump-sum determination is made, it is clearly unfair to give him the whole amount, because even an unsophisticated investor could earn a great deal of interest. However, in predicting how much money this worker will likely receive throughout the remainder of his work-life, we must consider the likely increase in wages he would have received. These will include possible advancements from one position to another, any raises due to company productivity, or other merit increases. In addition, in an inflationary economy, we must consider projected cost of living increases which are given by an employer to offset in part the effects of inflation. Each of these factors must be carefully

distinguished, since they arise from wholly different causes. Although these factors may not all be present in a particular case, each must be considered in computing the total amount of likely earnings *before* a discount rate is applied to reduce that amount to its present cash value because of investment potential. The goal, albeit ideal, is that if the injured worker has a 20-year work-life expectancy, and he invests his lump-sum award in relatively risk-free investments, he will receive in the nineteenth and in the twentieth year roughly the same amount as if he had worked each of those years. The goal is not, it must be made clear at the outset, to *protect* the lump-sum award from the effect of inflation. Rather, before determining how much now needs to be paid, the goal is to assure the plaintiff the equivalent of the total of all of his future wages, including those likely to be given/received in the form of cost of living increases in response to inflation.

III.

The Prohibitions of Penrod

In *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), we recognized "the likelihood that inflation could become a predictable condition for the future," but we were not able to "so surely discern the shadow of inflation as a coming event as to warrant requiring its inclusion in a present rule for calculating future damages." 510 F.2d at 236. Quoting the full initial panel opinion in *Penrod,* we expressly disapproved "the district court's attempt to take into account, in computing the plaintiffs' future lost earnings, inflationary trends in this nation's economy for the next several decades." 510 F.2d at 241. The "influence on future damages of possible inflation or deflation is too speculative a matter for judicial

determination." *Id.* Therefore, triers of fact "should not be instructed to take into account future inflationary or deflationary trends in computing future lost earnings, nor should the jury be advised to consider such alternative descriptions of inflationary and deflationary trends as the purchasing power of the dollar or the consumer price index." *Id.*

The defendants and others have suggested that *Penrod* could be "modified", "explained", or watered down by this Court, but not overruled, so that adjustments could be made in individual cases where the influence of inflation was not speculative. However, if fairness requires that we allow some evidence of inflation properly to compensate plaintiffs and avoid windfalls to defendants, any hope of "distinguishing" or "explaining away" *Penrod* crumbles in the face of *Penrod's* own words—inflation and deflation are too speculative for judicial determination, triers of fact should not take into account future inflationary or deflationary trends, juries should not consider changes in the purchasing power of dollars or the consumer price index, and judges should not undertake to instruct juries on such ideas. The prohibition on such evidence could not be clearer.

To argue, as the defendants do, that *Penrod* forecloses only consideration of *future* economic trends, while it allows evidence of past inflation, is to miss the point. The significant basis for predicting future inflation or deflation is *past* inflation or deflation. And the effect of past inflation alone, under a rule forbidding consideration of likely future inflation, leaves economically eclipsed a significant portion of the amount of money the wage-earner may receive in the future.

Even if it were possible to isolate *Penrod* and analyze its terms in an academic vacuum, to reach the conclusion that evidence of inflation is permissible in the Fifth Circuit so long as the jury is not permitted to "speculate" as to the "influence" on future damages of "possible" inflation or deflation, the result of this exercise would be unworkable as a practical matter. For in practice, *Penrod* has placed a prison-like wall between any evidence of likely inflationary or deflationary trends (and argument or instruction thereon) and the courtrooms of the Fifth Circuit. Our decisions since 1975 on this issue have merely served to place barbed wire on top of the wall. Moreover, it is likely that in other cases, as in this one, evidence of probable increases in wages due to merit or productivity has been kept out of the jury room unwittingly because of *Penrod's* prohibitions. Economic data is readily available concerning past average annual wage increases of workers in the United States, and such data is often broken down into particular professions and geographic areas. But it is difficult to determine the percentage of those increases given for merit-productivity and distinguish the percentage representing cost of living increases in response to inflation. Many plaintiffs have thus been unable to scale *Penrod's* wall and introduce evidence of non-inflationary wage increases, even though such increases are theoretically unaffected by inflation, and thus evidence of such increases should not have been prohibited.

IV.

Penrod in Practice

In our determination of whether *Penrod* ought to be overruled, it is important not only to consider what *Penrod* says, but also what this Court through the years since

1975 has said it says. We will look first to the recent cases arising in this Circuit applying *Penrod.* In *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977), this Court reduced the District Court's award of $628,991 to $425,321 for the total loss of the plaintiff's future earning capacity, because the District Court increased the basic damage award, prior to discounting to present value, to offset wage and price inflation. The plaintiff's expert was unimpeached, and the defendants had no opposing expert. The trial judge was thus free to rely on the expert's testimony, and was apparently convinced of the need to allow over $200,000 to offset expected wage increases due to inflation. 549 F.2d at 331. Nevertheless, we held that until *Penrod* is overruled,

> an inflation element cannot be included in damage computations, either in the form of [i] calculating loss of future earnings without discounting to present value or of [ii] increasing the basic damage award, prior to discounting, with a figure representing the projected inflation rate. The former [i] is the *Beaulieu* [v. Elliott, 434, P.2d 665, 671 (Alaska 1967)] method, the lattr [ii] the District Court's method in this case.

549 F.2d at 332 (brackets added). Judge Wisdom acknowledged that other circuits consider inflation as a factor in computing future earnings damages, an approach that "more accurately [reflects] loss of future earnins than does a discounted figure because it prevents inflation from eroding the damage award." 549 F.2d at 332. Alas, he conceded, his hand were tied by *Penrod. Id.*

In *In the Matter of S/S HELENA*, 529 F.2d 744, 753 (5th Cir. 1976), this Court remanded for recalculation the District Court's damages award because an inflationary rate was assumed and applied. In determining the damages

for loss of support payable to the wives of deceased crew members of a vessel, the trial judge stated:

> I have to some degree offset discount to present value by the effects of inflation and a likely rise in decedent's earnings resulting from increases in the general wage level. I have assumed a discount rate of 5%, and a three per cent inflationary level thus making the net discount rate 2%.

529 F.2d at 753, *quoting* 329 F.Supp. 652 at 660. Other calculations of the damages for loss of support also "seemed to be based on the inflation and present value factors, the expert testimony and present value factors, the expert testimony of an economist as to expected future earnings, and the present cost of annuities that would pay monthly amounts increasing at the estimated rate of inflation." 529 F.2d at 753. Quoting *Penrod*, we remanded to District Court for a more detailed calculation of the damages. On remand, the District Court filed supplemental responses heeding our instructions, and *Penrod* was again faithfully followed. *Matter of S/S HELENA, sub nom. Sincere Navigation Corp. v. United States*, 547 F.2d 255, 256 (5th Cir. 1977). The element of inflation was eliminated and the damages recomputed. *Id.*

In *Higginbotham v. Mobil Oil Corporation*, 545 F.2d 422, 433-35 (5th Cir. 1977), *rev'd and remanded on other grounds*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978), this Court reviewed the District Court's use of a 5% annual straight line estimated salary increase to calculate the probable future earnings of the deceased. Although the trial judge stated that he did not take into consideration "the decreasing purchasing power of the dollar," we held that under *Penrod* "the plaintiff must bear the difficult

burden of proving what portion of the increases would have been given other than as an automatic hedge against inflation." 545 F.2d 434-35. The defendant, wielding the mighty sword of *Penrod*, made the factually unsupported argument that "it is common experience that annual 'raises' are for the most part cost of living wages," therefore a 5% straight line annual increase amounted to a hidden inflation-based award. 545 F.2d at 434. While common experience likewise tells us that some portion of pay raises reflect performance and experience, the plaintiff's expert failed to distinguish between cost of living or inflationary increases and rewards for experience or productivity. 545 F.2d at 435. Thus we rejected the District Court's award based on the 5% future earnings factor, and remanded to give the plaintiff an opportunity to walk the straight and narrow of *Penrod*. Judge, now Chief Judge, Godbold, in his partial dissent, observed that in "innumerable other contexts we accept the events of the past as the basis for an inference as to what the future will hold." 545 F.2d at 437 (Godbold, J.). "Yet we would not permit consideration of evidence that a particular plaintiff had received a $200 per year increase in pay every year for 20 years, unless he could divide it up into 'productivity' pay and 'economic change pay.' " *Id.* (Godbold, J.).

> In this single area of projecting future earnings we deny ourselves the best evidence available on the asserted ground that it is not sufficiently reliable, and, in the name of reliability we mandate the artificial conclusion that one will earn the rest of his life what he is earning on the day he is killed or injured. The only thing certain about this is that it is certain to be wrong.

Id. (Godbold, J.).

In *Menard v. Penrod Drilling Company,* 538 F.2d 1084, 1089 (5th Cir. 1976), the plaintiff's economic expert estimated that, apart from the possibility that the plaintiff might advance through the ranks of his employer, a worker "would have to get at least 2% per year, on the average, increase to maintain the same buying that he has to-day." A discount rate of 4½% was selected by the expert. *Id.* Because no objection was made, the jury was actually permitted to consider future inflation as a factor in calculating damages. One member of this Court's panel observed that although this was not plain error, it would have been reversible error under *Penrod* had an objection been made. *Id.* (Gee, Jr., concurring).

Continuing our historical journey into the past, this Court in *Lacaze v. Olendorff,* 526 F.2d 1213, 1222 (5th Cir. 1976), *reh'g en banc granted,* 526 F.2d at 1223, found error in the trial court's overuling an objection to expert testimony on future lost earnings because the expert included a 3% inflation rate in his calculations. On the basis of *Penrod* the case was reversed and remanded on the issue of damages. 526 F.2d at 1223.

In *Weakley v. Fischbach & Moore, Inc.,* 515 F.2d 1260 (5th Cir. 1975), a diversity suit arising out of an electrical explosion in Texas, we affirmed the judgment of the District Court even though the jury considered both future productivity and future inflation in assessing a $300,000 award for lost earning capacity. For this Court, Judge Wisdom observed that although this "Court has writ large its disapproval of calculating future damages by reference to predictions of future inflation," Texas law applied and juries in Texas are permitted to weigh evidence of future inflation in setting awards for future damages. 515 F.2d at 1266-67, citing *Penrod.* In a similar federal cause of action

we may be certain that this Court would have reversed a judgment based on such a "speculative" jury finding.

Again, specifically on the basis of *Penrod*, we concluded in *Petition of M/V ELAINE JONES*, 513 F.2d 911, 912 (5th Cir. 1975) *cert. denied*, 423 U.S. 840, 96 S.Ct. 71, 46 L.Ed.2d 60 (1975), that the District Court erred by including a 2% per year cost of living increase in the computation of loss of future earnings. We announced that "the trier of fact should not be instructed to take into account future inflationary or defaltionary trends in computing future lost earnings."

In *Standefer v. United States*, 511 F.2d 101 (5th Cir. 1975), the District Court, sitting without a jury, awarded damages to a plaintiff for loss of future earnings and included an inflationary factor of 5.5%; in addition, the award of future medical expenses included an inflationary factor of 4.5%. Because *Penrod* foreclosed any consideration of inflation in computing such damages, the District Court's decision was reversed and remanded for a recomputation of damages.

Robertson v. Douglas Steamship Company, 510 F.2d 829 (5th Cir. 1975), stands as yet another example of how we applied the *Penrod* strait-jacket. In accordance with the trial court's instructions, the jury divided the plaintiff's award into (i) the amount of basic damages and (ii) the amount of damages sustained "as a result of loss of future wage increases or inflation or decrease in the purchasing power of money." 510 F.2d at 836-37. Of course, the second part of the award was reversed, even though it is possible that a portion of that element was awarded due to likely merit or productivity increases not based upon inflation or cost of living adjustments. Thus we see that although

Penrod was not intended to eliminate evidence of future wage increases on the basis of merit or productivity, the practical effect of *Penrod* is often to throw the baby of future merit increases out with the inflationary washtub waters.

Finally, on the very day that *Penrod* was published, this Court, in *Law v. Sea Drilling Corporation*, 510 F.2d 242, 251-52 (5th Cir. 1975) *on reh'ing*, 523 F.2d 793 (5th Cir. 1975), held that the District Court's allowance for additional inflationary cost of living increases was improper. Again, the increases in the decedent's income over the years before his death, upon which the trial judge based his reasonable expectation that the decedent's income would have continued to rise, probably reflected increases due to both merit and productivity and not just cost of living increases. Nevertheless, because an element of inflation was considered, *Penrod* was dispositive.

In all of the above discussed cases, this Court, by both its actions and its words, flatly prohibited any consideration of inflation, whether in evidence presented, in jury instructions or in final argument, without regard to the cogency or persuasiveness of the evidence offered to prove that inflation, to some extent, will likely occur. Swept unthinkingly before *Penrod* also were merit-productivity increases. Thus stands the law in this Circuit, until today.

In our attempt to assess the impact of *Penrod* in this Circuit, not only is it necessary to consider our own appellate opinions, as we have done above, but it is also helpful to review some of the District Court opinions where the tentacles of *Penrod* were perceived and predictably effective. *In Complaint of Metcalf*, 530 F.Supp. 446 (S.D.

Tex. 1981), the District Court stated emphatically that in its award for loss of earnings in the future, any "future inflationary or deflationary effect on earnings is not to be considered." 530 F.Supp.a t 458, *citing Penrod.* Likewise, in *Kratzer v. Capital Marine Supply Inc.,* 490 F.Supp. 222 (M.D. La. 1980), *aff'd* 645 F.2d 477 (1981), the plaintiff produced an economist who testified as to lost wages predicated upon an inflation factor and an increased productivity factor. The District Court simply cited *Penrod* and stated that there "was no evidentiary justification for these factors, and the Court declines to accept them, and as noted, utilized a discount figure of 6 percent with no other factors in computing lost wages." Again, we see how *Penrod* often operates to prohibit not only evidence of inflation, but also evidence of likely merit or productivity wage increases. In *McLean v. United States,* 446 F.Supp. 9 (E.D. La. 1977), the plaintiff carefully met his burden of proof by establishing a "productivity" factor of 5.7% on the basis of past merit and change in job title increases over his previous years of employment. Because that factor was in no way compensation for inflation, evidence thereof was admissible under *Penrod.* 446 F.Supp. at 13, 14. In *Thompson v. Offshore Co.,* 440 F.Supp. 752 (S.D. Tex. 1977), the District Court announced that in calculating a decedent's future earnings, any future inflationary effect on wages iss not to be considered. 440 F.Supp. at 762. Finally, in *Hamilton v. Canal Barge Co.,* 395 F.Supp. 978 (E.D. La. 1975), allowance for inflation or increased cost of living was denied in light of *Penrod,* and for the additional reason that the diminution in the purchasing power of an award, caused by inflation, is not an item of damage caused by death or by prepayment of future wages. 395 F.Supp. at 987. However, the District Court did allow a 4% annual increase factor on the basis of skill and productivity. *Id.*

Nesmith v. Texaco, Inc., 491 F.Supp. 561 (W.D. La. 1980), stands out as an anomaly to the law of *Penrod*. In startling contrast to the usual acceptance of *Penrod's* rejection of evidence of inflation, the District Court interpreted *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980), to say that "in arriving at an award for future loss of earnings the very factors disapproved in [*Penrod*] should now be considered."[7] 491 F.Supp. at 564. While the court was "mindful of the fact that this interpretation of *Liepelt* may be erroneous, and [*Penrod*] may still bar the door to speculative damages as to factors other than income taxes in a case of future loss from personal injuries," the plaintiff was permitted to present expert testimony that the growth rate for wages based upon inflationary factors in the plaintiff's job and geographic area will be approximately 6% over the next 30 years. 491 F.Supp. 564, 565 n. 4. This attempt to break the bonds of *Penrod* resulted in an appeal, disposition of which is being held pending the outcome of the present opinion and *Byrd*, *see* note 1.

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[7] In *Liepelt*, the Supreme Court said:

> [There] are many variables that may affect the amount of a wage earner's future income tax liability. The alw may change, his family may increase or decrease in size, his spouse's earning may effect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future help, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life.

444 U.S. at 494, 100 S.Ct. at 757, 62 L.Ed.2d at 694.

The cases discussed in this section demonstrate the absolute prohibition on any consideration of inflationary or cost of living trends in the courts of this Circuit. District Court judges have found themselves under a duty, imposed by *Penrod*, to prevent experts in their testimony, and attorneys in their arguments, from even mentioning economic trends that would effect future wage increases. Likewise, in their instructions to the jury, District judges have been careful not to mention inflation as a factor in computing damages, or, where inflation was mentioned, the purpose was to explain to the jury that they should *not* consider inflation in their computations. In those cases where the jury was permitted to consider the effect of future inflation or damage awards, either because they heard testimony by an expert or because the trial judge instructed them to consider inflation, we have reversed the judgment and, in most cases, remanded for a new trial. In non-jury cases, the District Court judges have not been permitted to consider inflation in their assessment of damages. Even where plaintiffs have clearly limited their evidence (as to inflation) to likely cost of living increases, thereby carefully avoiding any inference that the total award should be somehow "protected" from inflation irrespective of wage increases, the evidence has been rejected. In short, *Penrod* in practice has been a firm, inflexible standard that we have been unable to explain or interpret away. The standard is simple: no evidence of inflation may be presented to the trier of fact, regardless of how expert the testimony, how understandable the presentation, or how fair to the parties. Argument of counsel is also forbidden, as is jury instruction by the Court. This standard has at times been so overwhelming that it has prohibited evidence that should have been allowed, such as evidence of likely wage increases based upon merit or productivity, either on a misreading of *Penrod* or a perceived (and

sometimes actual) impossibility of separating out inflationary elements from admissible merit-productivity increases. Quite possibly, an employer may take into account rising inflation in his decision to grant promotions, and it would be impossible for anyone, expert or otherwise, to distinguish that part due to merit *only* and determine the percentage amount of the raise due wholly to non-inflationary factors.

V.

Penrod and Other Circuits

Worthy of our consideration is how our sister circuits perceive *Penrod.* In 1975, the Eighth Circuit, *citing Penrod,* was able to say that the

> federal circuits that have faced the issue in cases involving federally created claims, governed by federal rather than state law, have for the most part rejected testimony, jury instructions or trial court consideration of future inflationary trends in damage assessment.

Johnson v. Serra, 521 F.2d 1289, 1295-96 (8th Cir. 1975), *aff'd on remand,* 586 F.2d 1291 (8th Cir. 1978). More recently, however, in the trend toward increasing consideration of inflation, *Taenzler v. Burlington Northern,* 608 F.2d 796, 800 n. 9 (8th Cir. 1979), cited *Penrod* but declined to follow its approach. Expert testimony on future wage increases, when limited to future trends in earnings of a particular group of employees, thus avoiding the excessively general national inflation rate, was found to be acceptable in trial courts.[8] 608 F.2d at 801.

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[8] The Court tempered its acceptance of limited expert testimony

Feldman v. Allegheny Airlines, Inc., 524 F.2d 384 (2d Cir. 1975), a case arising under Connecticut law, cited with approval Judge Friendly's earlier assessment of inflation:

> There are few who do not regard some degree of continuing inflation as here to stay and would be willing to translate their own earning power into a fixed annuity, and it is scarcely to be expected that the average personal injury plaintiff will have the acumen to find investments that are proof against both inflation and depression—a task formidable for the most expert investor.

524 F.2d at 388, *citing McWeeney v. New York, New Haven and Hartford Railroad*, 282 F.2d 34, 38 (2d Cir. 1960) (Friendly, J.). The computation by trial Judge Blumenfeld of the discount rate of earnings on a prudent unsophisticated investment by an inflation factor was approved.[9] This computation, subtracting the assumed inflation rate from the rate of interest on a safe investment (the traditional discount rate), yields an "inflation-adjusted discount rate." Judge Fiendly, a member of the panel in *Feldman*, was not completely satisfied with this result—*Penrod's* emphasis on "the plethora of uncertainties" that

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(Footnote 8 continued)
on inflation with the caution that expert testimony predicting future inflation at a specified rate (i) may mislead the trier of fact by its pretended exactness, (ii) may distort the effect of inflation by not including "concomitant increases for countervailing effects of inflation such as higher rates of return on investment," and (iii) may open up collateral matters that waste time and confuse the issues such that its probative value would be outweighed. 608 F.2d at 801. As will become clear in our discussion, we share these concerns.

[9] 524 F.2d at 387. The plaintiff's expert at trial calculated the discount rate by establishing 4.14% as the average annual earning power of a safe investment, and then subtracted 2.87% as the average yearly inflation rate over an 18-year period, which yielded a 1.27% difference which was rounded up to 1.5%. *Id.*

accompany testimony regarding inflationary trends was contrasted with the trial court's apparent construction of "an iron-clad guaranty against the unknown and unknowable future effects of inflation." 524 F.2d at 392 (Friendly, J. concurring). Such protection against inflation is *not* enjoyed by the millions of Americans on fixed pension or investment income, or even by the average worker whose wages do not keep up with inflation. This highlights a weakness in the *Feldman* approach: it assumes that wage increases will mirror inflation. *Id.* Judge Friendly thus predicted that *Feldman* "will not constitute a precedent on the inflation problem in a case arising under federal law." 524 F.2d at 393, (Friendly, J. concurring).

More recently, in a suit brought by an injured cargo checker against a stevedore and a shipowner (neither was his employer), pursuant to the LHWCA, 33 U.S.C. §§ 901 *et seq.*, the Second Circuit carefully considered the question whether and to what extent an award for lost future wages should be adjusted because of inflation. *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980), *cert. denied*, 451 U.S. 971, 101 S.Ct. 2049, 68 L.Ed.2d 351 (1981). *Penrod* as well as similar cases in the Third[10] and First[11] circuits were identified as unsound minority views. 634 F.2d at 36. Broad agreement was perceived among economists that inflation "is a dominant factor on the current economic scene and, despite episodic recessions, is likely to be so for the foreseeable future." 634 F.2d at 37.

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[10] *Magill v. Westinghouse Electric Corp.*, 464 F.2d 294, 299-301 (3d Cir. 1972). *But see Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3d Cir. 1982) ("total offset method" adopted; no discount rate to present value is applied, because future inflation will offset the plaintiff's ability to draw interest on the award), discussed in section XI *infra*.

[11] *Williams v. United States*, 435 F.2d 804 (1st Cir. 1970).

The District Court in *Doca*, 474 F.Supp. 751, 758 (S.D.N.Y. 1979), found that the plaintiff was entitled to recover $352,560, "representing his future loss of earnings considering both probability of continued inflation and a discount to present value." The extent to which inflation was considered was unspecified, and no computation was provided by the District Court. 634 F.2d at 34. On appeal, the plaintiff urged that the trial judge used a discount factor of 1%, an inference drawn by comparing the difference between the award given and the plaintiff's own projection of future lost wages. 634 F.2d at 34 & n. 4. The defendants objected to the court's computation on the grounds of lack of evidence to support an estimate of future inflation and argued that any adjustment for inflation is impermissible. 634 F.2d at 34-35.

The Second Circuit in *Doca* described two basic approaches as to how inflation could be considered. First, the question of inflation rate may be submitted to the fact finder in one of three ways: (i) by allowing expert opinion, (ii) by requiring the fact finder to apply its own knowledge, or (iii) by permitting the fact finder to apply its own knowledge together with expert testimony. Each of the three contemplate that a separate determination as to inflation is to be made in each case. Second, a rule of law may be adopted that focuses on the somewhat constant relationship between inflation and interest rates, as in the Alaska Supreme Court's view[12] that the inflation rate should be assumed to equal the interest rate, thereby eliminating the discount to present value. 634 F.2d at 38-39. The *Doca* Court was not prepared to specify any particular methodology:

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[12] *Beaulieu v. Elliot*, 434 P.2d 665 (Alaska 1967).

> If litigants prefer to offer evidence as to future rates of both inflation and interest, they are entitled to do so....
>
> We emphasize that we are not requiring the use of an inflation-adjusted discount rate.... Litigants are free to account for inflation in other ways, or, if they use the adjusted discount rate approach, to offer evidence of a rate [other] than 2%.

634 F.2d at 39-40. The District Court's award was remanded for reconsideration for two reasons: (i) if a 1% adjusted discount rate was used, it was too low since 2% is the "true cost of money appropriate for use in a computation to determine the present value of lost future wages,"[13] and (ii) the District Court took into account a post trial wage increase based upon cost of living, therefore duplicative consideration was given to the impact of inflation.[14] 634 F.2d at 40.

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[13] This figure, 2%, "lies within the narrow range bracketed by many economists as representing the true yield of money." 634 F.2d at 39. There "is substantial opinion that during periods of stable rates of inflation, the real yield of money, whether constant or slightly fluctuating, is approximately 2%...." 634 F.2d at 39 n.10. This theory of the real rate of interest will be discussed in detail later in this opinion. It may be noteworthy that the Second Circuit was dealing with findings of a District Judge, not a jury verdict.

[14] The court is here making a critical point with regard to adjusting a discount rate for inflation. There are basically two methods of calculation: In the first, if the sum total of a plaintiff's future earnings is computed by multiplying his annual income for the year he was injured times the number of years of his work expectancy, then it is fair to both plaintiff and defendant to apply a discount rate that has been adjusted for inflation. For example, if a relatively safe investment yields 6%, and the inflation rate is predicted to be 4% over the period of that investment, then the adjusted discount rate would be 2%, and this would be separately applied to each year's projected actual earnings not increased by inflation. Under the second method, if the sum total of the plaintiff's future earnings is computed by adding up the annual earnings of the plaintiff based upon likely cost of living increases (*i.e.*, $10,000 in

Feldman, supra, approved the use of an "inflation-adjusted discount rate" of 1.5%. 524 F.2d at 387. The purpose of the method used in *Feldman*, and approved as one possible technique in *Doca*, was to determine the "real yield" of money—that portion of interest gained on virtually risk-free investments which represents only the real growth of the investment and not the losses due to future inflation.[15] The theory is that the "real yield" of money is roughly 2% in any year, because in periods of high inflation, interest rates will be a bit higher, and in low inflationary periods, the interest rates will still be a little above the rate of inflation.

Doca recognized the disagreement among economists over the validity of the assumption that the real rate of interest is constant and consequently independent of inflation, but noted that various economic studies of similar time frames have estimated that the real rate of interest was between 1.5% and 3%. 634 F.2d at 39 n. 10.

VI.

Penrod and Some Commentators

In 1977, one commentator—with an error in timing—

(Footnote 14 continued)
1981, $11,000 in 1982, $12,000 in 1983, etc.), then the full discount rate, *e.g.* 6% in the above example, should be separately applied to each year's figure of the plaintiff's projected future earnings.

[15] 634 F.2d at 35. Under this approach, the adjustment to account for future inflation is accomplished by *decreasing the traditional present value discount*. This rate is determined by subtracting the average annual change in the consumer price index over each of several years from the effective annual interest on government bonds held during each of the same years, and then computing the average of the rates resulting from these subtractions. *Feldman, supra*, 382 F.Supp. 1271 at 1306-12.

predicted that "the Fifth Circuit soon could decide...that *Penrod* is 'substantively indefensible.' "[16] This was precipitated by Judge Wisdom's concurring opinion in *Freeport Sulphur Co. v. S/S HERMOSA*, 526 F.2d 300, 311 (5th Cir. 1976) (Wisdomm, J., concurring). Judge Wisdom there expressed his dissatisfaction with *Penrod* and identified the inconsistency in this Circuit's insistence upon discounting while ignoring inflationary effects. *Id.* The policy concerns of *Penrod*, (i) achieving complete compensation, (ii) preventing speculation, and (iii) simplifying trial procedures, would be served better by adopting an approach that considered the effect of inflation on damage awards. *Id.*

Penrod has also been labeled a source of serious judicial error. Kane, *Inflation, tight money, and Penrod: the cost of judicial error*, Texas Trial Lawyers Forum, April-June, 1980, at 3-5. In *Penrod*, we stated that "if future inflation does cause higher wages, experience predictably demonstrates that higher interest rates on investments which have always accompanied inflation will also occur and this factor will mitigate the failure to include an inflationary surcharge in wage rate calculations." 510 F.2d at 236.

> The obvious flaw in this line of reasoning lies in the fact that while interest rates do rise in response to accelerating inflation, a higher interest rate only *reduces* the present value of a future loss, thus further penalizing the plaintiff. The problem for the plaintiff is compounded when the series of future income payments cannot be proportionally increased for the same inflation that drove up the interest rate.

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[16] Comment, *Future Inflation, Prospective Damages, and the Circuit Courts*, 63 Va. L. Rev. 79, 115-16 (1977).

Kane, *supra*, at 3-4.

Spiraling inflation during the years since *Penrod* has indirectly led to much of the criticism of our 1975 opinion.[17] Although consumer prices have fallen in the early months of 1982, which might signal the beginning of the end to "spiraling" inflation,[18] this does not demonstrate that *Penrod* is not so bad after all. The problem with *Penrod* is not primarily its spectacular unfairness in periods of extremely high inflation. To the contrary, the danger of *Penrod* lies in its unwillingness to consider the effect of inflation on future wages at all. *Penrod* stands for the inflexible proposition that triers of fact should not consider inflation or deflation at all, whether high or low or nonexistent, in predicting wage loss. At the same time, defendants are freely allowed to show the highest inflation-induced interest rates available on relatively safe investments. Unfortunately, any evidence of the fact that

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[17] The *Statistical Abstract of the Unitead States, 1980* (101st Ed., U.S. Dept. of Comm.), indicates the following annual Consumer Price Index increases:

1975	9.1%
1976	5.8%
1977	6.5%
1978	7.7%
1979	11.3%
1980	14.4%

Id., Table No. 807, at 486. In addition, the annual percentage increase in Consumer Prices for 5 year periods reveals the following changes:

1970-1975	6.6%
1971-1976	6.9%
1972-1977	7.3%
1973-1978	8.0%
1974-1979	7.9%

Id., Table No. 706, at 425.

[18] "Why Prices Are Falling," Newsweek, Feb. 22, 1982, at 59.

wages will likely increase to combat the eroding effects of inflation remains eclipsed by the Court-declared spectre of *speculation.*

What we seek, in response to criticism from both within and without the Circuit, is fairness with regard to the presentation of economic data by either side in the legal controversies that our federal courts face. The principles that we adopt to facilitate this goal must be flexible enough to remain workable in any economic climate. To this end, the remainder of this opinion will explore the alternatives and adopt those that meet the standards of economic flexibility and fairness to plaintiffs and defendants alike.

APPENDIX "D"

Ruth CULVER, et al.,

Plaintiffs-Appellants Cross-Appellees,

v.

SLATER BOAT CO., et al.,

Defendants-Appellees Cross-Appellants,

EURO-PIRATES INTERNATIONAL, INC., et al.,

Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, et al.,

Defendants-Appellees Cross-Appellants.

No. 79-3985

United States Court of Appeals,
Fifth Circuit
Unit A

May 4, 1981.

Wife and children of foreman of anchor-pulling crew brought maritime personal injury case arising out of foreman's death. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., held that foreman was free from negligence and that employer, bareboat charterer, and owner of drilling barge were actively negligent and not entitled to indemnity, and appeals and cross appeals were taken. The Court of Appeals,

Ainsworth, Circuit Judge, held that: (1) district judge properly refused to allow testimony, charges, or interrogatories concerning effects of inflation on any award of damages; (2) district judge properly refused to allow plaintiffs to argue to jury that foreman's wages would have increased over time and that jury should take this into account in its award of future support; (3) district judge properly substituted 9.125 percent for 25 percent as discount rate to be applied to jury's award; (4) district judge did not err in failing to submit interrogatories to jury which would have separated each plaintiff's award from those of the other four; (5) evidence was sufficient to support jury's determination that defendants were negligent; and (6) each defendant was actively negligent and thus not entitled to indemnity.

Affirmed as modified.

Sam D. Johnson, Circuit Judge, filed a concurring opinion.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before AINSWORTH and SAM D. JOHNSON, Circuit Judges, and HUNTER*, District Judge.

AINSWORTH, Circuit Judge:

This maritime personal injury case raises several issues, including the use of an inflation factor to compute

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* District Judge of the Western District of Louisiana, sitting by designation.

future loss of earnings, the construction of jury instructions and interrogatories, and the rights to indemnity between actively and passively negligent tortfeasors. The district court's disposition of the indemnity issue requires a slight modification; in all other respects we affirm the district court.

I. FACTS.

Curtis Culver, the husband and father of plaintiffs-appellants, was the foreman of an anchor-pulling crew employed by Gulf Overseas Marine Corporation (Gulf). Shell Oil Company (Shell) contracted with Gulf to provide an anchor-pulling crew to assist in moving the drilling barge OCEAN QUEEN to a new location off the Louisiana coast in the Gulf of Mexico. In their anchor-pulling operations, the Gulf crew used the vessel M/V BLACK BART which was owned by Charles D. Slater d/b/a Slater Boat Company and leased under a bareboat charter to Euro-Pirates International, Inc. (collectively EPI). The OCEAN QUEEN was owned and maintained by Ocean Drilling & Exploration Company (ODECO). Essentially, the Gulf crew's job was to use the machinery on the BLACK BART to lift the anchors of the OCEAN QUEEN out of the seabed, to float the drilling barge to its new location, and to anchor it again there. To get control of the anchor line, the Gulf crew, under the direction of foreman Culver, first "lassoed" a buoy attached to the anchor line and brought the buoy aboard the BLACK BART. Then, a set of unusual circumstances combined to produce the unfortunate accident which gives rise to this lawsuit. The anchor line was too short, and the BLACK BART drifted away from the OCEAN QUEEN: thus, the cable "lasso" was holding not only the weight of the line but also the weight of the anchor. The taut cable "lasso" raked across a jagged surface

of the buoy and severed. As the buoy raced back over the deck of the BLACK BART and into the water, it struck Culvaer who had left his position of safety at the stern of the vessel to inspect the line. Culver died from his resulting injuries.

Culver's widow and children sued Shell, Gulf, EPI, and ODECO under the Jones Act, 46 U.S.C. § 688, the Death on the High Seas Act, 46 U.S.C. § 761 et seq., maritime tort, and negligence. Shell was dismissed as a party defendant. The remaining defendants filed appropriate cross-claims. A jury found all the remaining three defendants negligent, the BLACK BART unseaworthy and Culver free from contributory negligence. As between the defendants, on their cross-claims for indemnity, the district court found each actively negligent and not entitled to indemnity from either of the other two. The judge held that Gulf was negligent because its employee, Curtis Culver, failed to remain in his position of safety away from the anchor line. However, the district judge did not disturb the jury's finding of no negligence[1] on the part of Culver in the main action.

In determining the damages sustained by the Culvers for the death of Curtis, the district judge allowed testimony concerning discount rates and the earning power of money invested in low risk bonds. The judge instructed

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[1] The jury interrogatory concerning Curtis Culver's negligence reads as follows:

> 5. Was Mr. Curtis Culver negligent in a manner which contributed to causing his own injury and death?
>
> Yes __ No X

R. vol. 3 at 629.

the jury to "discount the total amount" of any award for loss of future services or support by a percentage that represents an appropriate rate of interest.[2] The interrogatory submitted to the jury[3] was returned with a discount rate of 25% filled in. The judge decided that obviously the jury had misunderstood, and he substituted the only other rate put into evidence, 9.125%.[4] The total award after discounting was $238,861.05. The district judge did not allow testimony, charges, or interrogatories to be submitted on the effects of inflation on any damage award,

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[2] The district judge instructed the jury:

> Therefore if you find that any of the Culvers will sustain a loss of support and/or services in the future, the amount is to be reduced, that is you should discount the total amount that you think will be lost by a percentage that you feel represents an appropriate rate of interest at the present time in the New Orleans area.

R. vol. 8 at 858.

[3] The interrogatory reads as follows:

> f. If you have made any award to plaintiffs for loss of support and/or services in the future (parts b, c, and d of this question), what discount percentage rate do you find to be applicable in order to reduce the award for future loss of support and/or services to their present value. (Your answer to this question should be in the form of a percentage.)
>
> twenty-five percent

R. vol. 3 at 631.

[4] Defendant ODECO's expert witness in the field of bond investments, Mr. Donald Hattier, an investment banker with E. F. Hutton, testified that an investor could purchase U.S. government bonds with a coupon rate of 9.125% in denominations of $1,000 with a maturity date in the year 2009 (Culver's normal work-life expectancy). R. vol. 7 at 735. At the time of trial the bonds were selling at a slight discount which the distrit judge chose to ignore. Mr. Hattier testified further that government bonds were the safest in the marketplace.

citing *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir.), *cert. denied*, 423 U.S. 839, 96 S.Ct. 68, 46 L.Ed.2d 58 (1975), as his reason therefor.

II. INFLATION FACTORS

The Culver's principal contention is that this circuit's en banc decision in *Johnson v. Penrod Drilling Co., supra*, relating to the use of an inflation factor to compute future loss of earnings, has been overruled either by changed circumstances or by the Supreme Court's decision in *Norfolk and Western Railway Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). In *Penrod*, we held that "the influence on future damages of possible inflation or deflation is too speculative a matter for judicial determination." 510 F.2d at 241. Therefore, "triers of the facts should not be instructed to take into account future inflationary or deflationary trends in computing lost earnings." *Id.* The Culvers argue that the extremely high rates of inflation this country has experienced in recent years make the *Penrod rule an unjust anachronism and that in any case, Liepelt* has overruled *Penrod.*

In *Liepelt*, the Supreme Court responded to an argument that future prediction of tax consequences is "too speculative and complex for a jury's deliberations":

> Admittedly there are many variables that may affect the amount of a wage earner's future income tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of

> estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.

444 U.S. at 494, 100 S.Ct. at 758.

Our recent decision from Unit B of the Fifth Circuit in *Byrd v. Reederei,* 638 F.2d 1300 (5th Cir. 1981), specifically addresses the continued vitality of *Penrod* and is dispositive of the issue here before us. In *Byrd,* we noted first that "[a]n en banc decision of our court may be overruled only by subsequent en banc consideration or by the United States Supreme Court." *Id.* at 1308. *Byrd* then considered the argument for admitting inflation factors in light of *Liepelt.* "*Liepelt's* favorable dicta is only that. Thus, until the Supreme Court speaks more directly or we, as an en banc court, decide otherwise, *Penrod* still applies...." 638 F.2d at 1308. We are in agreement with *Byrd's* disposition of the *Liepelt* issue.

III. INCOME INCREASES

The Culvers next object to the district judge's not allowing them to argue to the jury that Curtis Culver's wages would increase over time and that the jury should take this into account in its award for future support. As we read the record, the district judge refused to permit the

Culvers to argue such increases for two reasons. First, the Culvers offered no evidence to show that such an argument was warranted.[5] Curtis Culver's tax returns for the preceding five years showed that his income was level, not increasing, and Culver had reached the top of his particular line of work. Plaintiffs' counsel's attempt to prove increases were not sufficiently relevant to Culver's particular circumstances.[6] Second, the trial judge stated that possible job promotions and merit wage increases were merely an indirect way of putting inflation factors into evidence before the jury and were thus not allowed under *Penrod*. We find no error in the trial judge's rulings concerning wage increases.[7]

IV. DISCOUNT RATE

The Culvers also object to the district judge's

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[5] The district judge did allow the Culvers' witness to testify to increases in the hourly wage for anchor-pulling crew foremen from $4.75 in 1975 to $6.50 in 1978 and $6.96 on the date of trial in 1979. R. vol. 6 at 276. The judge explained a formula to the Culvers' attorney by which Curtis Culver's hypothetical 1978 and 1979 salaries could be estimated, *id.* at 279, but counsel chose not to use that formula. By using the formula, Culver's earnings would have been approximately $19,000 per year in 1979. R. vol. 8 at 766. Instead counsel stated that he wished to argue, without any apparent evidentiary support, Culver's earnings would be $35,000 per year. *Id.*

[6] *Counsel attempted to establish Culver's hypothetical 1978 earnings, a year for which counsel had adduced an exact hourly wage, by reference to the earnings of other foremen working for other companies. Counsel did not use Culver's personal work history to establish earnings.*

[7] *The district judge did permit the jury to consider provable increases in the wage of Gulf anchor-pulling foremen up to the time of trial in determining future earnings. However, the jury was apparently unimpressed with any of the arguments relating to wage increases. It chose instead to fix damages at the approximate average earnings that Culver had reported on his income tax statements for the five years prior to his death.*

substitution of 9.125% for 25% as the discount rate to be applied to the jury's award. The Culvers argue either that a rate of 25% *per year* is manifestly unjust and does not conform to the evidence, thereby entitling them to a new trial, or, alternatively, that the jury's application of a 25% *total* discount cannot be disregarded and replaced by a yearly rate put into evidence by a defense witness. We recognize that the jury instruction and the interrogatory concerning the discount rate were subject to either a "total" or a "per year" interpretation.[8] However, it is clear to us that the parties and the court intended, and the law requires,[9] a per year rate. A 25% lump sum reduction in the award is not a rate. The trial judge was faced with a situation where applying a 25% per year discount would have been unjustly harsh and applying a 25% reduction would have been contrary to the law. The Culvers chose not to put evidence of a discount rate into the record. Although they had an economist on their witness list, they did not call him to testify. Adopting the rate suggested by the defendants' expert was a proper exercise of the district judge's discretion.

V. APPORTIONMENT OF DAMAGES

The Culvers' final contention is that the case should be remanded for the trial court's failure to submit interrogatories to the jury which would have separated each plaintiff's award from those of the other four. The argument is without merit. The conflicting interests of the individual plaintiffs in a separated award, and the fact that

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[8] *See* notes 2 and 3 *supra*.

[9] *Chesapeake & O. Ry. v. Kelly*, 241 U.S. 485, 490-91, 36 S.Ct. 630, 632, 60 L.Ed. 1117 (1916).

the suit was brought by Curtis' wife for herself and as representative of the children, make this federal maritime suit the improper vehicle to apportion the award. Any separation is better left to the state court which appointed Mrs. Culver representative of her children. Moreover, the record contains no evidence on which the jury could have based its apportionment.

VI. DEFENSES AND CROSS-CLAIMS

In its answers to interrogatories, the jury held all defendants negligent and also determined that Curtis Culver was free from contributory negligence. Stating that his disposition of the cross-claims was "in conformity with the verdict of the jury," the district judge found all defendants were actively negligent and apportioned the damages equally between them.

All defendants first contend that the jury's determination that they were negligent is without evidentiary support. We disagree. Evidence in the record, as outlined in Section I, *supra*, is sufficient and adequate to support the jury's verdict. *See Fairley v. American Hoist & Derrick Co.*, 640 F.2d 679 at 680-81 (5th Cir. 1981); *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 n.6 (5th Cir. 1978); *Manchack v. S. S. Overseas Progress*, 524 F.2d 918, 919 (5th Cir. 1975). Next, each defendant cross-claims against its codefendants and asserts that the district judge's findings of active negligence as to it are erroneous, that it was only passively negligent, and is therefore entitled to indemnity from its codefendants. EPI's and ODECO's claims in this regard are without merit. The failure of EPI's crew on the BLACK BART to keep a proper lookout and its allowing the vessel to drift were substantial causes of Culver's ultimate injury; therefore, EPI's negligence was active. *See*

Chesapeake & Ohio Railway v. Illinois Central Gulf Railroad, 564 F.2d 222, 224 (7th Cir. 1977), *cert. denied*, 435 U.S. 919, 98 S.Ct. 1515, 55 L.Ed.2d 535 (1978). Likewise, ODECO's use of an anchor line that was too short and the failure to maintain its buoy amounted to active negligence.

Gulf's claim that it was only passively negligent requires more extended discussion. In the indemnity phase of the case, the district judge found Gulf actively negligent based on the failure of its employee, Curtis Culver, to stay in a position of safety at the stern of the vessel; yet, the jury found Culver free from negligence. These findings are obviously inconsistend. The judge followed the jury's findings in all other respects. Under the circumstances, the jury determination will prevail.

Although the jury exonerated Culver of negligence, it nevertheless found that Gulf was negligent. Gulf contends that the jury's determination can be based only on Gulf's failure to provide a safe place to work under the Jones Act, 46 U.S.C. § 688[10] and that such a failure is merely passive or technical negligence. Accordingly, Gulf

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[10] Section 688 of the Jones Act provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

argues that the district court, consistent with the jury's answers to interrogatories, should have held that Gulf is entitled to indemnity from the active tortfeasors ODECO and EPI. *Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 181 (5th Cir. 1969). We need not decide here whether mere failure to provide a safe place to work is active or passive negligence. *But see Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977) *and Avondale Shipyards, Inc. v. The Vessel THOMAS E. CUFFE*, 434 F.Supp. 920, 928 (E.D.La.1977) (Rubin, J.) (both cases suggesting that liability without fault for unseaworthiness is the only instance where indemnity should be allowed). Where a tortfeasor's own acts and omissions help create the unsafe workplace, its negligence undoubtedly is active. *Wedlock v. Gulf Mississippi Marine Corp., supra* at 243; *Transcontinental Pipeline Corp. v. Mobile Drilling Barge*, 424 F.2d 684, 693 (5th Cir.), *cert. denied*, 400 U.S. 832, 91 S.Ct. 65, 27 L.Ed.2d 64 (1970); *General Electric Co. v. Cuban-American Nickel Co.*, 396 F.2d 89, 99 n.16 (5th Cir. 1968); *Avondale Shipyards, Inc. v. The Vessel THOMAS E. CUFFE, supra* at 928. The jury heard evidence during the trial that Gulf's anchor-pulling crew failed to notice the jagged buoy, that the crew failed to ask that additional anchor line be added before lassoing the buoy, that its anchor box used in lifting the anchor may have been defective, and that the cable lasso may have been the wrong gauge or strength for performing the operation. From the general nature of the jury's response to the interrogatory concerning Gulf's negligence,[11] it is impossible for us to say that its finding of negligence

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[11] The jury interrogatory and answer read as follows:

> 1. Was defendant Gulf Overseas Marine Corporation or Gulf Overseas Service Corporation negligent in a manner that was a proximate cause of the injury and death of Mr. Culver?
>
> Yes X No __

was not based on one or more of these theories. Any one of these would constitute active negligence. Therefore, Gulf's claim for indemnity must likewise be denied.

Finally, ODECO's claim for a reduction in the damage award based on the judge's finding of comparative negligence on the part of Curtis Culver is unsupportable since we are modifying that portion of the district court judgment.

The judgment is

AFFIRMED AS MODIFIED.

SAM D. JOHNSON, Circuit Judge, concurring:

This writer concurs in the majority opinion, but wishes to supplement it in one particular: Th time is right for en banc reconsideration of the rule in *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), pertaining to the "inflation factor" in damage awards.

The en banc precedent of *Penrod* does indeed mandate the result that this panel reaches. Immediate en banc rehearing of the instant case is therefore urged as the appropriate route toward the proper disposition of this critically important issue.

Ruth CULVER, et al.,

Plaintiffs-Appellants Cross-Appellees,

v.

SLATER BOAT CO., et al.,

Defendants-Appellees Cross-Appellants,

EUROPIRATES INTERNATIONAL, INC., et al.,

Defendants-Appellees and Cross-Appellees-Appellants,

v.

ODECO DRILLING, et al.,

Defendants-Appellees Cross-Appellants.

No. 79-3985

United States Court of Appeals,
Fifth Circuit

June 24, 1981

Appeals from the United States District Court for the Eastern District of Louisiana; Charles Schwartz, District Judge.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion May 4, 1981, 5 Cir., 1981, 644 F.2d 460).

Before GODBOLD, Chief Judge, BROWN, AINSWORTH, CHARLES CLARK, RONEY, GEE,

TJOFLAT, HILL, FAY, RUBIN, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., GARZA, HENDERSON, REAVLEY, POLITZ, HATCHETT, ANDERSON, RANDALL, TATE, SAM D. JOHNSON, THOMAS A. CLARK, and WILLIAMS, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.